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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

23 Cr. 10 (AS)

5 AVRAHAM EISENBERG,

6 Defendant.

Oral Argument

7  
8 New York, N.Y.  
9 March 14, 2024  
2:10 p.m.

10 Before:

11 HON. ARUN SUBRAMANIAN,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

15 United States Attorney for the  
Southern District of New York

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23 NOAM B. GREENSPAN, ESQ.

24 ALSO PRESENT: BRANDON RACZ, Special Agent, FBI

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(Case called)

THE COURT: All right. We're here for a hearing on pending motions *in limine* and motions to exclude certain expert testimony.

So first, let's start with appearances for the government.

MR. DAVIS: Good afternoon, your Honor. Peter Davis, Thomas Burnett, Tian Huang for the government, and we're joined at counsel table by Special Agent Brandon Racz.

THE COURT: Good afternoon.

And for the defense.

MR. KLEIN: Good afternoon, your Honor. Brian Klein here with our client Avraham Eisenberg, with—oh.

MR. GREENSPAN: Noam Greenspan and Sam Talkin.

THE COURT: Okay. Good afternoon. And good afternoon to you, Mr. Eisenberg. I hope you're hanging in there. Everything okay?

THE DEFENDANT: (Nodding)

THE COURT: Okay. Let's start with the motions *in limine*.

I think the best way to do this is to go motion by motion. Folks should remain seated because these microphones are so short. So we can just go back and forth on some of these issues.

So I'll start with Mr. Eisenberg's motions *in limine*.

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1 There are two motions, but one is raised for purposes of  
2 preservation, so I'll start with the motion to exclude general  
3 references by the government at trial to victims divorced from  
4 any particular identification. That's Mr. Eisenberg's motion  
5 No. 1. Now as I understand it, the government is going to  
6 identify the victims at issue which, in the government's view,  
7 are the Mango Markets DAO and the Mango Markets customers; is  
8 that correct?

9 MR. BURNETT: That's right. We won't identify like  
10 all of those customers by name but by category.

11 THE COURT: By category. And so given that  
12 understanding, is there any further basis from the defense to  
13 exclude those references to victims?

14 MR. KLEIN: Your Honor, they alleviated our concern by  
15 doing that. Obviously we'll see what happens in their opening  
16 and at trial, but for now we are satisfied.

17 THE COURT: Okay. And of course, as with any motion  
18 *in limine*, as things develop during trial, then all you need to  
19 do is approach the bench and we can hash it out.

20 So the motion No. 1 will be denied based on the  
21 understanding that's been provided in this hearing.

22 And motion No. 2 is to exclude duplicative government  
23 exhibit testimony. And the defense indicates that it's raising  
24 that for preservation purposes, but from the government's  
25 perspective, is there going to be a concern here that the

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1 government's witnesses are providing duplicative testimony?  
2 Just give me some explanation on what the differences are  
3 between the two experts.

4 MR. BURNETT: Sure. So the differences between the  
5 experts are pretty significant. One of the experts, Mr. Jain,  
6 will be effectively talking about the economic features of  
7 USDC, the economic features of perpetuials, and kind of  
8 explaining some of the basics of cryptocurrency terminology.  
9 Then Mr. — or Dr. Mordecai, the other expert, will largely be  
10 talking about data analysis and the economic analysis of the  
11 actual scheme that was carried out. I think, you know, there  
12 might be some brief overlap to the extent that when  
13 Mr. Mordecai uses certain terms and concepts that came up  
14 during Mr. Jain's testimony, he may need to briefly define them  
15 to make sure the jury is not lost, because it would be a little  
16 awkward otherwise not to, but the goal is not to waste anyone's  
17 time. We have every incentive not to be duplicative in an  
18 annoying or unnecessary way.

19 THE COURT: Okay. So I'll deny this branch of  
20 Mr. Eisenberg's motion. Of course, as with the other one, if  
21 there's any issue that comes up during trial, then you can  
22 raise it.

23 So let's move to the government's motions *in limine*.  
24 First, now I've numbered these. Please let me know if I'm  
25 missing something. I think the way it was laid out in the

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1 motion wasn't by number; it was by category. So I'm going to  
2 use a numerical system when I'm going through these, but you'll  
3 let me know if I'm missing something.

4 So the first motion concerns arguments or presentation  
5 that the charges against Mr. Eisenberg are novel; essentially  
6 that the application of the Commodities Exchange Act claims to  
7 his conduct would be novel and unprecedented. The argument  
8 from Mr. Eisenberg is that that's relevant because of, among  
9 other things, the *mens rea* requirement. And so from the  
10 government's perspective, why isn't that right? Given the  
11 willfulness requirement that attaches to at least the  
12 commodities fraud claim, why can't Mr. Eisenberg argue that the  
13 application here is novel?

14 MR. BURNETT: So we think there are two reasons. One  
15 is, maybe there is an issue with the way legally they're  
16 defining willfulness, but I think I'm going to take that second  
17 because I think that's not a dispute that the Court needs to  
18 resolve right now, because more fundamentally, the problem with  
19 this argument is a foundational point.

20 So for something to go—for evidence to go to *mens*  
21 *rea*, there needs to be some foundation that the defendant  
22 actually saw or thought the thing that is being argued from.  
23 So I think this is a little hard to think about in the abstract  
24 but easier to think about in the context of specific examples.

25 So for instance, one of the things that's cited in the

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1 briefing is that Mr. Eisenberg tweeted about a market  
2 manipulation case involving an FX trader name Neil Phillips,  
3 and that tweet included a DOJ press release about that charge.  
4 Now I think it would certainly be fair game for both the—for  
5 the defense and the government to argue inferences from that  
6 tweet, like, look, this is not about cryptocurrency, it is  
7 about open market manipulation, within the context of the text  
8 of the tweet, and like the DOJ press release, because there's a  
9 foundation that Mr. Eisenberg saw that and thought something  
10 about it. What would not be allowed would be then kind of an  
11 open-ended, let's go through the docket of what was going on in  
12 the Phillips case, like, here's the motion to dismiss, here's  
13 the response to the motion to dismiss, here are some of the  
14 legal issues and lawyers' characterizations of those issues,  
15 because there's no foundation that Mr. Eisenberg was actually  
16 reviewing that or following it.

17 THE COURT: Well, that's true. But I think here, the  
18 argument is that there is a foundation because what we are  
19 talking about is Mango Markets and the conduct at issue, and  
20 simply whether the application of the law to that conduct as to  
21 which there is a foundation would either support or refute an  
22 inference concerning willful intent. So I guess I'm taking  
23 your point and shifting the focus of the inquiry, which is,  
24 yeah, it's not about, directly, what Mr. Eisenberg actually  
25 thought or didn't think, and of course the government is

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1 challenging Mr. Eisenberg's ability to put through his experts  
2 any kind of testimony concerning intent, but what they're  
3 essentially saying is, if you take the basic conduct and the  
4 basic conduct is so different than anything the law has been  
5 applied to, from that, that can be one of the things that the  
6 jury considers when thinking about Mr. Eisenberg's intent,  
7 along with whatever else they want to put in on those grounds.  
8 Why isn't that a possibility? I'm not saying that you are  
9 going to say that's wrong, but—

10 MR. BURNETT: So I think there's both a relevance  
11 issue and a 403 issue with respect to that. So when we're  
12 talking about—so for instance, like, I don't even know how  
13 this would, like, come out in trial, but let's say the defense  
14 gets up and in their case in chief starts like dumping in court  
15 decisions about market manipulation, saying, well, this one  
16 isn't about crypto, this one's not about open market  
17 manipulation, this one's not about that; that can't plausibly  
18 go to the defendant's intent because there is no evidence that  
19 he ever saw or thought about those cases. So to the extent  
20 this is an intent argument, there's not the foundational step  
21 that he saw the facts that would inform that intent or not.

22 THE COURT: Wouldn't that be an argument that you  
23 would raise during trial? I mean, part of the issue here is  
24 that neither you nor I know exactly what evidence is going to  
25 be put in that would implicate this concern. So isn't this the

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1 type of issue that we would evaluate with respect to the  
2 evidence that comes in? Because if you're making a foundation  
3 argument, then you could make that argument. I'm not  
4 foreclosing any argument that you might make. Usually the  
5 motion *in limine* would be relevant if there was some actual  
6 thing that we knew was on the horizon that was going to come in  
7 and you had a challenge to that general thing coming in. But  
8 it seems like maybe we don't have an issue here because we  
9 don't know what this thing is that would come in, for precisely  
10 the reason that you're saying; you can't imagine what it is.  
11 If they try to put in court decisions about Phillips, you would  
12 have an argument that that would be inadmissible for a number  
13 of reasons, right?

14 MR. BURNETT: Yes. I think certainly if we're on the  
15 same page that there would need to be some kind of foundation  
16 to link whatever the thing is to Mr. Eisenberg's intent, that  
17 it could be handled on a case-by-case basis. Really the reason  
18 we raised this at the motion *in limine* stage was in part to  
19 frame this but also, in some cases that are similar to this  
20 case, defense has effectively opened on, "This is a totally  
21 novel prosecution, the government's never done anything  
22 before," making an argument that's effectively untethered to an  
23 intent and basically something that is impugning the  
24 government's decision to bring this case because it is novel  
25 and abstract, which is effectively more like lawyer advocacy



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1 about what their view on the law is, not even an intent  
2 argument. I haven't—I didn't got a representation that that's  
3 going to happen, but from experience in cases like this,  
4 there's a risk of that happening, which is often why we bring  
5 this motion, to make sure that's not on the horizon.

6 THE COURT: Okay. I'm mindful of the issue.

7 I'll let whoever's going to speak on Mr. Eisenberg's  
8 behalf address it, if they would like to.

9 MR. KLEIN: Your Honor, we don't intend to dump in  
10 those documents. I will say I think this motion is premature.  
11 If we are addressing these issues, they plan to be tethered to  
12 evidence and facts that the government puts in, in response, or  
13 to—we'll have a foundation for putting them in. So I think  
14 your Honor is on the right track there.

15 I would just note one quick thing—it's a little side  
16 issue, but—when they filed this motion, they listed types of  
17 evidence they might put in, and they had like six categories or  
18 four categories. I mean, we do plan to object to the Phillips  
19 tweet coming in and the lawsuit being filed. We can address  
20 that at the time of the trial, whatever. We obviously didn't  
21 see this note. We haven't seen their exhibit list. But we  
22 think there are other grounds to exclude both of those in fact,  
23 so—the Phillips tweet, so we wouldn't even bother dumping the  
24 Phillips documents.

25 THE COURT: Understood. So this is the kind of issue

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1 that we can address at the final pretrial conference.

2 But for purposes of the motion *in limine*, I'm going to  
3 go ahead and deny the motion without prejudice to reasserting  
4 these arguments at a later juncture.

5 MR. BURNETT: Thank you, your Honor.

6 THE COURT: Okay. Now as to whether Mango Markets was  
7 regulated in the US, while I could see an argument as to the  
8 novelty of this case and how that goes to willfulness, I don't  
9 know how Mango Markets' regulatory status goes to an issue in  
10 this case. So maybe whoever's going to speak on  
11 Mr. Eisenberg's behalf can explain that.

12 MR. KLEIN: Yes.

13 THE COURT: Maybe you're not intending to raise that  
14 type of issue.

15 MR. KLEIN: Well, we may, your Honor. I think we  
16 addressed it in our brief on page 9. They're planning to offer  
17 into evidence, again, stuff about my client's alleged knowledge  
18 about the Commodity Exchange Act, knowledge about certain  
19 issues there. They also plan, we understand, to call people to  
20 discuss Mango Markets and how it worked, and the implication is  
21 clear from both of those that they're going to say, he should  
22 have known that what he was doing was covered by the  
23 Commodities Exchange Act.

24 THE COURT: And you can defend those arguments. But  
25 the precise issue here is whether or not Mango Markets was

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1 subject to the jurisdiction of the SEC or CFTC. So it's a  
2 slightly separate issue. And I'm not sure that there is a  
3 relevance to that particular issue.

4 MR. KLEIN: I think we should be permitted to ask  
5 certain questions on cross-examination. I don't know what  
6 they're going to elicit on direct so it's hard to know, your  
7 Honor, but it may become relevant depending on what the person  
8 they put on or people they put on and how they discuss Mango  
9 Markets—how it operated, how it functioned, what our client  
10 knew. So again, we're sort of operating in a little bit of a  
11 vacuum because we don't know exactly how they're going to put  
12 on their case, what their exhibits are, but we do think—

13 THE COURT: Is the government going to raise the  
14 jurisdictional status, whether this market was under the  
15 jurisdiction of the SEC or the CFTC in any of its presentation  
16 of the evidence?

17 MR. BURNETT: No. From our perspective, the only  
18 jurisdictional thing that matters is whether the antifraud and  
19 antimanipulation provisions apply in this case, and that's the  
20 jurisdictional element that the Court will instruct the jury  
21 on, not these separate issues about whether this is a  
22 registered entity or should have been a registered entity  
23 and/or somewhere in between, or with whom.

24 And I'd add, this actually puts a point on this  
25 foundational issue because let's say we put on a witness for

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1 Mango Markets who talks about how Mango Markets works. If they  
2 were to ask that person, well, aren't you subject to—you're  
3 not subject to CFTC regulation, right? That can't plausibly go  
4 to *mens rea* because there's no foundation that Mr. Eisenberg  
5 had any knowledge or idea of what Mango Markets' view of  
6 whether it was subject to SEC or CFTC jurisdiction was.

7 This kind of dovetails back to the point I was making  
8 earlier about how these foundational issues will be important  
9 to police. You can't just say it goes to intent without  
10 explaining why it goes to intent.

11 THE COURT: Okay. I'm going to grant this branch of  
12 the government's motion, particularly on 402, 403 grounds,  
13 because I think this particular issue is more attenuated than  
14 the argument as to whether the application of the law to  
15 Mr. Eisenberg's conduct was novel or not. It goes to  
16 jurisdictional and regulatory issues that either the Court is  
17 going to instruct the jury about or which just aren't relevant  
18 to the case in any way. Of course, again, as with everything  
19 else, if it comes up and the government opens the door, then  
20 you can certainly approach and you can revisit this issue.

21 All right. Now we go to the next branch of the  
22 government's motion, which is to preclude the defendant's "code  
23 is law" arguments; the idea being that because the Mango  
24 Markets code did not prevent the conduct at issue and the  
25 platform did not have terms of service, Mr. Eisenberg's conduct

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1 was legal. As to this, my understanding from the submissions  
2 is that the defendant does not plan to make that argument; is  
3 that fair?

4 MR. KLEIN: Yes, your Honor. We're not planning to  
5 make that argument.

6 THE COURT: It is also my understanding that the  
7 government recognizes that evidence about the Mango Markets  
8 code and lack of terms of service may have some relevance at  
9 trial, including on intent, right?

10 MR. BURNETT: Yes. And if I could make a suggestion  
11 here. I think this issue becomes most concrete with respect to  
12 some of the *Daubert* arguments that come up, particularly with  
13 respect to Mr. Sheridan, so what I might propose is to kind of  
14 move this to the end of the motion *in limine* discussion and it  
15 can segue into the *Daubert* discussions, because that's where it  
16 gets concrete.

17 THE COURT: No, you're a hundred percent right on  
18 that, and without prejudice to any of those particular  
19 arguments on the Sheridan motion, as a general matter, I mean,  
20 you've moved *in limine* to preclude general arguments along  
21 these lines, Mr. Eisenberg says he's not going to make those  
22 arguments, so I think I'm going to deny the motion *in limine* in  
23 general. But to get to the particular issue, you're not  
24 suggesting that the lack of terms of service and the function  
25 of the code, what it permitted and didn't permit, that that is

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1 irrelevant to the issues in the case, given what you've put in  
2 your papers?

3 MR. BURNETT: That's right. I think we have concerns  
4 about the arguments that are made about them and the way that's  
5 presented.

6 THE COURT: Okay. So I'm going to deny this branch of  
7 the government's motion, but of course that's without prejudice  
8 to what happens at trial and certainly without prejudice to our  
9 discussion on Mr. Sheridan's expert testimony. I understand  
10 that you have particular arguments that you've focused on  
11 there.

12 Okay. And just a side note. So there are three  
13 claims here. One of them is wire fraud. If this were just a  
14 wire fraud prosecution, would you have any basis to exclude any  
15 of this evidence on the terms of how Mango Markets worked, what  
16 its terms of service were? Would there be any basis to exclude  
17 any of that? Because you would have to prove the scheme to  
18 defraud, and that scheme would involve the relationship between  
19 Mr. Eisenberg and Mango Markets and its customers, and so if  
20 that relationship is just as a result of the code and terms of  
21 service, how they changed, all that stuff, I mean, wouldn't  
22 that necessarily have to come in barring some separate  
23 admissibility issue? Because that's a primary issue that the  
24 government would have to address.

25 MR. BURNETT: So I want to make sure I'm understanding

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1 what you mean by "come in."

2 So I think, as we've agreed here, the facts would come  
3 in. I think it would still be correct that the argument that  
4 because there was not like a term of service saying you can't  
5 commit fraud and the code did not prohibit fraud does not make  
6 it a defense; that that is not an absolute defense to wire  
7 fraud.

8 THE COURT: And that is not going to be permitted, and  
9 Mr. Eisenberg says that they're not going to try to do that.

10 MR. BURNETT: Right. So I think we're on the same  
11 page, that this comes in as to all of the charges. The  
12 relevance differs depending on the charge, but the point is  
13 more the inference and the way it's argued.

14 THE COURT: Okay. Understood.

15 Okay. The next branch of the government's motion is  
16 on terms of service implemented after the alleged crime.  
17 Mr. Eisenberg says, look, you recognize that the absence of  
18 terms of service at the time of the offense may be relevant to  
19 things like intent. The fact that terms of service were  
20 instituted afterward is plainly relevant to highlight the lack  
21 of terms of service during the time in question. There would  
22 be, in another case, potential grounds under Rule 407 to  
23 exclude the change in the terms of service. But Rule 407  
24 doesn't apply here. That's what the other circuits have held  
25 uniformly. And my understanding of Rule 407 is that the

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1 preclusion of changes in terms or warning, things of that  
2 nature, is not because they're not relevant but because there  
3 was a policy concern about incentivizing companies to do those  
4 types of things, to change their warnings to put measures in  
5 place to protect against future harms, not because it's not  
6 relevant or reliable or anything like that.

7 So given all that, why shouldn't Mr. Eisenberg be  
8 allowed to introduce testimony or evidence concerning changes  
9 in terms of service subject to all the other things we talked  
10 about? They can't say that the lack of terms of service or  
11 changes in terms of service means that this is not illegal, or  
12 legal, subject to all those other issues.

13 MR. BURNETT: I'll start with the 403 arguments here,  
14 but first, with the relevance prong—

15 THE COURT: Sure.

16 MR. BURNETT: —it's actually not relevant to  
17 anything. And it's not relevant for this reason. It's not  
18 relevant to the defendant's intent because at the time that he  
19 committed the crime, the defendant had no way of knowing  
20 whether or if Mango Markets was going to add terms of service  
21 later. The fact that they ultimately did or what those terms  
22 of service covered could not possibly have been in the  
23 defendant's head. What could have been in the defendant's head  
24 is the absence of terms of service at the time, which the  
25 defense will be allowed to offer. The government will probably



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1 make that point as well. But the creation of them does not  
2 bear on his intent at the time because he couldn't have  
3 possibly known which way it would shake out in the future.

4 THE COURT: That's true. But doesn't it just come in  
5 because, you know, you have someone from Mango Markets on the  
6 stand and you say, well, at the time of the offense, it wasn't  
7 against any terms of service to do X, Y, or Z, and they say,  
8 well, I don't know. And then you just bring in the later terms  
9 of service and you show it to him and you say, well, you  
10 changed this to add those terms of service so clearly at the  
11 time of the offense, the terms of service did not address the  
12 thing that you changed in the later terms of service. Why  
13 isn't that something that could be raised? Now I don't know if  
14 it will, but I'm saying it's relevant not because these later  
15 terms of service were in Eisenberg's head in some way at the  
16 time of the offense but just to highlight the differences  
17 between what was the state of play at the time of the offense  
18 and what happened afterwards. I understand that's all that  
19 they're trying to get—

20 MR. BURNETT: Sure, but highlighting the difference  
21 between the time of the offense and after needs to be relevant  
22 to something. My expectation is if a witness from Mango  
23 Markets were asked, "Did the attack violate any terms of  
24 service that were in place at the time," that person would say,  
25 "No, there were no terms of service at the time." Then the

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1 fact that there were later terms of service, I guess it like  
2 highlights that there were no terms of service before, but  
3 highlighting it is not relevant. It doesn't move the ball  
4 forward on any actual issue related to the defendant's intent,  
5 because he couldn't have known what they were going to do.  
6 What matters is the lack of terms of service at the time, both  
7 as to the defendant's intent but also as to Mango Markets'  
8 expectations or the expectations of Mango Markets' customers.  
9 So I agree it would be relevant to highlighting the difference,  
10 but highlighting the difference is not a relevant fact.

11 It is also I guess confusing and misleading to the  
12 jury in a few different ways.

13 So first of all, it does kind of run into some of  
14 these "code is law"-type inferences. I think because it's not  
15 really relevant to anything related to intent, the natural  
16 inference of jurors sitting there will draw is like, well,  
17 gosh, like, you have it now, so now it would be prohibited, but  
18 like, you didn't have terms of service then so, like, why is  
19 this then illegal? That's the inference the jury will  
20 naturally draw from this, which is exactly the inference that  
21 the defense is saying they're not going to try and draw out.  
22 So that's a serious 403 problem.

23 We also think that there is kind of some additional,  
24 like, underlying privilege problem that this may implicate  
25 about why they didn't have terms of service before or why they

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1 changed them, like, what the thought process was there,  
2 particularly in the DeFi context, where it's kind of like who  
3 is the terms of service between, because normally it's an  
4 agreement between the user and, like, a particular entity. I  
5 don't think it's worth getting—that piece is worth getting  
6 into now, but—

7 THE COURT: I can't imagine what the privilege issue  
8 would be with Mr. Eisenberg. I mean, you have the terms of  
9 service, right? You haven't raised the privilege issue. If  
10 there is some sort of privilege issue that I'm not  
11 appreciating, then I'll obviously hear it, but—

12 MR. BURNETT: Yeah. I think the bigger point is that  
13 there is no relevance to highlighting, to this highlighting  
14 fact and it does run into this "code is law" issue.

15 On the 407 point, I won't belabor it. I understand  
16 the circuits have gone the other way on this defendant as the  
17 party issue. I note that those were not criminal cases, which  
18 actually kind of makes an important difference, because a  
19 victim in a criminal case is entitled to, like, restitution, so  
20 to the extent there are policy concerns about, like, people not  
21 doing things because they might, like, run themselves out on  
22 the judgment later, like, some of these issues do apply in the  
23 context of a victim in a criminal case. And the text of 407  
24 itself actually doesn't draw this distinction that's been drawn  
25 in the circuits.

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1 But I think what matters more for us is that on 407  
2 grounds, some of the other policy implications in 407 highlight  
3 that this type of evidence is normally of pretty minimal value  
4 and is prejudicial anyway, which feeds into this 403 argument  
5 which is really the heart of our case here.

6 THE COURT: Okay. And how does this use of the  
7 after-the-fact terms of service fall into the categories that  
8 would be prohibited under Rule 407?

9 MR. BURNETT: Fall into the—

10 THE COURT: If they're just using it to highlight the  
11 fact that during the time of the alleged offense, there were no  
12 terms of service that covers the things that are later  
13 addressed.

14 MR. BURNETT: I think it falls into three of the  
15 categories. So it falls into trying to prove negligence, prove  
16 a product or design defect, and to prove the need for a warning  
17 or instruction. At least from like what it sounds like  
18 Mr. Sheridan will be arguing, or some other things they'll be  
19 trying to introduce, the point they're making is, well, Mango  
20 should have seen this coming, they could have taken steps to  
21 stop this, they, like, could have put a warning out or could  
22 have prohibited this in the terms of service, which would have  
23 decreased the chance of it happening. So those are the buckets  
24 it fits in.

25 THE COURT: And your expectation of the way the

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1 evidence is going to come in is that it's not going to be  
2 disputed that at the time of the offense there were no terms of  
3 service that would cover these types of things, or prohibit  
4 them.

5 MR. BURNETT: I don't think so, no.

6 THE COURT: Okay. Can I hear from whoever is going to  
7 speak for Mr. Eisenberg, specifically on the relevance issue.  
8 Government says there's really no need to bring this in and so  
9 the prejudicial impact of allowing this testimony in would  
10 substantially outweigh any probative value, especially given  
11 that the government's not going to be even arguing that there  
12 were terms of service that covered this or somehow it was  
13 prohibited by the code or anything along those lines.

14 MR. KLEIN: Your Honor, it's directly relevant, as we  
15 discussed in our opposition to it. A couple of key issues.  
16 One is what Mango Markets' customers were thinking, who he was  
17 trading with, who he's accused of making misrepresentations to,  
18 goes to materiality there. It also goes to what he might have  
19 been thinking when he engaged with the protocol. They're going  
20 to put in evidence that obviously that he went on to Mango  
21 Markets, that he conducted these trades, and it's going to come  
22 in that there were no terms of service. And I think it is  
23 important to highlight what happened later because they're so  
24 explicit later. They're very explicit. And I think they're in  
25 one of our briefs. They talk about a number of actions you

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1 could take that would not be permitted. And I think that is  
2 important to highlight, and it shows that someone—and it is  
3 directly relevant to his *mens rea*, willfulness, intent, what he  
4 might have been thinking because they were so explicit later.  
5 And I guarantee if those explicit terms had been in in the  
6 first place, they'd be jumping all over them. They do not like  
7 that they put them in later. That's too bad. They came up  
8 later in direct response to what happened here, we believe, and  
9 that is directly relevant to showing that what he did was not  
10 criminal, that it was understood, at least by him, that he was  
11 not operating in a criminal mind-set. There was no intent to  
12 commit a crime; there was no willfulness. So I think it is  
13 really, really critical here, actually, that the later terms  
14 come in, and I think it's really important and super relevant,  
15 and I think the jury will find it very relevant, and again,  
16 there may be some parameters about what we can argue and we can  
17 see how it comes in, but we're not going to argue that they  
18 should—this isn't an argument about restitution. This is an  
19 argument about whether he committed crimes. So I don't  
20 understand the restitution argument. 407 definitely does not  
21 cover this. It covers a party who's being sued, and it's for  
22 policy reasons that are not present here. And Mr. Eisenberg  
23 deserves a chance to put on his defense. And this is critical  
24 to his defense.

25 THE COURT: Right. How is it critical? The

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1 government is saying that they're not going to argue that at  
2 the time of the offense there were policies or protocols that  
3 prohibited this, and you can argue all you want the same thing,  
4 right? They're not going to contest it; you can argue it.  
5 What happens after the fact can't go to Mr. Eisenberg's intent  
6 at the time of the offense. All it can do really is to  
7 highlight what the other evidence already shows. And there is  
8 a risk of some confusion of putting in later terms precisely  
9 because it wasn't something that was in place at the time and  
10 because of the government's concern that if there is too much  
11 emphasis on these terms of service and the code, there may be  
12 an issue of jury confusion, that what they're being asked to  
13 determine is whether the code permitted this or whether there  
14 were terms of service in place at the time that addressed this  
15 particular issue. That's the concern. That's purely just  
16 whether there's a 402, 403 issue. I get your point on 407. I  
17 don't think that that applies here. It's really just on  
18 whether there's a concern about prejudicial impact or if risk  
19 of confusion would substantially outweigh probative value here,  
20 given that these terms weren't in place at the time of the  
21 events.

22 MR. KLEIN: We're not going to argue that he saw them  
23 later, okay, to be clear. We're not going to make that  
24 argument. And we're also not going to tell the jury, because  
25 those terms were in there later, it means his conduct—we're

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1 not going to do a "code is law" defense, right? So their  
2 prejudice concern can be dealt with in a jury instruction, and  
3 very simply, that says—

4 THE COURT: Give me the probative values.

5 MR. KLEIN: Sure. Because what's in his brain when  
6 goes in there, you can draw an inference from what was in later  
7 what the lack of terms would mean to somebody. You can draw a  
8 direct inference, because they're so explicit. And the lack,  
9 you can say, we can infer from very explicit terms that they  
10 could have put in what somebody might think at the time they're  
11 doing this when there are no terms. And that's directly  
12 relevant. We're allowed to draw inferences just like they are.  
13 And that's a fair inference to draw.

14 THE COURT: Really what you're using this for is,  
15 you're making concrete for the jury what you mean by there were  
16 no terms of service at the time, by showing the jury, here's  
17 what happened afterward, just so you can see what could have  
18 been in place at the time but wasn't, all right? Is that a  
19 fair way to kind of put it? Like you're saying, it's abstract  
20 if we just say there were no terms of service and the jury  
21 doesn't understand what that means, but when you show them what  
22 terms of service could have been in place, by what they  
23 actually did, that emphasizes to the jury the lack of the  
24 terms—

25 MR. KLEIN: Absolutely. They're offering it in a



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1 vacuum. We all know what terms of service look like when we  
2 sign anything. It could be crazy rules in terms of service.  
3 This is a very specific instance, with a very concrete lack of,  
4 and later there was after this incident. And I think it does  
5 exactly what your Honor is saying. It allows the jury to  
6 understand what was happening here and puts a concrete—or puts  
7 a pin in it, for our client.

8 THE COURT: I'm going to deny the motion on that  
9 understanding. However, you have emphasized several of the  
10 guardrails that you intend to follow in terms of what you are  
11 not using this evidence for. So I expect the government is  
12 going to stand up and object if there is any abuse of those  
13 guardrails, and I assume you understand what we're talking  
14 about here in terms of the "code is law" argument—any  
15 suggestion that the later terms of service would directly bear  
16 on Mr. Eisenberg's intent at the time, those types of issues.  
17 You understand that.

18 MR. KLEIN: Absolutely, your Honor.

19 THE COURT: Okay.

20 MR. BURNETT: Your Honor, I just want to make sure I  
21 understand that last point. When you say any suggestion that  
22 they would directly bear on Mr. — I'm just trying to make sure  
23 I understand what the inference is if it's not being—

24 THE COURT: Let me be very clear. My understanding is  
25 that Mr. Eisenberg wants to put in the terms of service solely

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1 to highlight the lack of terms of service during the time  
2 period in question, and not to make some direct argument that  
3 the later terms of service somehow maybe would have made it  
4 illegal to do it afterwards but it wasn't illegal to do it  
5 during the time of the offense. That's an example. It's  
6 purely just to highlight for the jury the kinds of terms of  
7 service that could have been implemented.

8 Let me just take a step back. During the time of this  
9 offense, there were no terms of service at all; is that right?

10 MR. BURNETT: On Mango Markets, although I think, to  
11 the point about highlighting what is possible, I'd say two  
12 things.

13 So first of all, there were terms of service on two of  
14 the other exchanges that Mr. Eisenberg used to manipulate the  
15 price of Mango. So to the extent the point is, well, the jury  
16 needs a counterpoint to understand that there could be terms of  
17 service that prohibit manipulation, they'll have those in  
18 evidence because that was something that did exist at the time,  
19 and you could draw that comparison there.

20 And second, they could also just ask a witness, you  
21 could have had terms of service, right? I assume they'll say  
22 yes.

23 THE COURT: Well, you could do those things, but the  
24 limited way in which I'm foreseeing these later terms of  
25 service being used here is just a clear way to make that point

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1 to the jury. And if that's all they're doing and they're  
2 saying, okay, you didn't have terms of service at the time,  
3 yeah, we didn't, and here are terms of service you put in after  
4 this, which address this conduct, isn't that right, and if  
5 that's essentially all that's being done, I don't know that  
6 there could be any prejudice or if there's a risk of confusion  
7 that would substantially outweigh that probative value, which  
8 is to just show what they didn't have and then show what they  
9 did have. Understanding that a lot of the evidence and  
10 testimony that's coming in is trying to translate for the jury  
11 this unfamiliar world of what's happening in this crypto space,  
12 okay? And so I think in that context, it's potentially helpful  
13 to show what this actual exchange did in the after-the-fact  
14 time period, but recognizing the government's concerns about  
15 the "code is law" arguments and any direct argument that is  
16 being made concerning Mr. Eisenberg's intent. Just thinking  
17 about it, I'm not even sure what that argument would look like,  
18 but I understand the relevance issue just being, they didn't  
19 have them at the time and they adopted them later. And if you  
20 had a solid 407 argument, then I think it would be out. But I  
21 don't think that there's a solid 407 argument here, given the  
22 law of all the other circuits.

23 MR. BURNETT: So it can't go to the "code is law" and  
24 it can't go to the defendant's—

25 THE COURT: They're not going to make the "code is

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1 law" argument. If they make the "code is law" argument, then I  
2 expect that you will object and it would be out.

3 MR. BURNETT: But can it go to defendant's intent?

4 THE COURT: I don't understand how it would go to the  
5 defendant's intent, in any direct. I said direct. And this  
6 goes back to what we were talking about before. I think what  
7 they're going to say is that there were no terms of service and  
8 that that fact has a bearing on intent. The government  
9 recognized that. So they were just highlighting that fact by  
10 showing what they could have done by putting in the later terms  
11 of service. That's it. I mean, maybe we're making too much of  
12 this at this juncture.

13 MR. BURNETT: Yeah. I just expect it will be the  
14 feature of an intent argument down the road, so I want to make  
15 sure I know where its lines are.

16 THE COURT: We'll police the lines. I mean, this is  
17 like with any motion *in limine*. I don't believe there's a  
18 basis to categorically exclude reference to the later terms of  
19 service, but as issues arise, I'm sure that you will raise  
20 them.

21 Next, the government's argument concerning  
22 Mr. Eisenberg's partial repayment as a defense to the charged  
23 crimes. And as I understand it, Mr. Klein, I think that you're  
24 not making the argument that partial repayment of any kind is a  
25 defense to any of the alleged crimes, correct?

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1 MR. KLEIN: All we're saying is they're going to put  
2 in evidence—

3 THE COURT: First, are you making any argument that  
4 partial or full repayment is an actual defense to the crimes in  
5 question?

6 MR. KLEIN: It's not an affirmative defense, it's  
7 not—it's on a solo basis, a defense. But they're putting it  
8 in. And can I go on, your Honor, or—

9 THE COURT: Yes.

10 MR. KLEIN: They're going to put in evidence about it,  
11 they said that, and we need to be able to respond to it, and  
12 that's what we're saying. So if they're going to offer  
13 evidence—which they said they are—about the repayment and  
14 what it meant, the settlement negotiations that happened, then  
15 we're going to be able to cross-examine on it and make argument  
16 about it.

17 THE COURT: Again, what's the benefit? If it's in,  
18 it's in, so what am I missing?

19 MR. BURNETT: Well, they're trying to keep it out for  
20 us.

21 THE COURT: Maybe that question is better directed at  
22 the government. Are you going to put this stuff in?

23 MR. BURNETT: Yes. So let me kind of walk through  
24 what the facts are on this piece of this. That will help make  
25 concrete how we envision in coming in and what we're arguing.

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1 What we're trying to preclude is arguments about certain  
2 inferences to draw from it. So basically here's what happened.  
3 So—

4 THE COURT: Wait, wait. Say that again.

5 MR. BURNETT: Sorry. We're looking to limit arguments  
6 about certain inferences the jury should draw, should be able  
7 to draw from any partial repayment.

8 THE COURT: Okay.

9 MR. BURNETT: So after Mr. Eisenberg's attack, he  
10 begins negotiating with Mango's DAO, representatives of Mango's  
11 DAO, as to some kind of resolution—or what is, in his mind, a  
12 resolution. I think the Mango people view it differently. And  
13 in that discussion, what eventually comes out of it is  
14 Mr. Eisenberg agrees that he will return some portion of the  
15 money, and in exchange, one of the things he gets is an  
16 agreement from the Mango Markets users, theoretically, that  
17 they will not press criminal charges against him. And in a  
18 text message to a friend of his that he is messaging with  
19 around the same time, he refers to wanting to reach some kind  
20 of deal so there are no "sympathetic victims." So we plan to  
21 introduce the partial repayment as part of the jury  
22 understanding that story and in part because some of these  
23 facts about what he says to the friend and, like, this part  
24 about, you know, getting an agreement not to press criminal  
25 charges, we think bear on his intent and on the willfulness

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1 issue. What we think is not permissible is for the defense to  
2 argue to the jury that, well, because he made some repayment  
3 and, like, intended to make some repayment, he acted in good  
4 faith. And the reason they can't make that good faith argument  
5 based on this partial repayment is that case law in the Second  
6 Circuit is very clear that a belief or an intent—a belief that  
7 everything will work out fine, people will get their money back  
8 after the fact, is not good faith and is not a defense to a  
9 wire fraud charge or to a securities case, commodities fraud  
10 charge. So our point is not that they can't—the fact of the  
11 payment will be in evidence. What we are saying is that they  
12 can't argue from the fact of repayment that you know he had or  
13 acted in good faith because that is legally incorrect.

14 THE COURT: Okay. And what should we make of the  
15 language from *Vincent*? Which is not really explained, but it  
16 seems to suggest that a partial recovery or it says, "A partial  
17 recovery might be relevant to a defendant's intent to defraud."  
18 And it doesn't explain that.

19 MR. BURNETT: So two things. First, obviously, it's  
20 an out-of-circuit case, so the Second Circuit case law we think  
21 is clear on this point.

22 THE COURT: I don't need more references. I just want  
23 to know, what's the—

24 MR. BURNETT: So actually, the sentence is clipped in  
25 the brief. So the full sentence says, "While a partial

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1 recovery might be relevant to a defendant's intent to defraud,  
2 Simpson's recovery does not advance the theory that Vincent  
3 made an honest mistake." So I think that that main clause is  
4 important because I think what the Second Circuit is getting  
5 at, you might have a situation where you're like, oh, my god,  
6 I'm so sorry, I didn't mean to get this, take it back, in which  
7 case, like, sure, but that's like a really different situation  
8 than we're talking about here.

9 THE COURT: I understand.

10 Okay. So Mr. Klein, I'll let you respond to all of  
11 that. But as I understand the motion a little bit better now,  
12 what they're saying is you can talk about the partial  
13 repayment, and you can bring that up, and make clear to the  
14 jury that there was a partial repayment and potentially that  
15 bears, for instance, on, when the government is talking about  
16 victims, you may want to raise the fact that there was at least  
17 a partial repayment, and you'll take the bad with the good. As  
18 the government points out, there are circumstances of that  
19 partial repayment that you may not like. However, you should  
20 not be permitted to make the argument that the later partial  
21 recovery bears in any way on the intent to defraud for the  
22 reasons that Mr. Burnett just identified. So what's the  
23 response there?

24 MR. KLEIN: I mean, I disagree with that, your Honor.  
25 I think we should be allowed to argue that. They're opening



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1 the door wide open on this repayment issue. They're going to  
2 put in a lot of evidence apparently about it. Obviously we  
3 don't know exactly how it's coming in.

4 THE COURT: I don't think there's an objection to  
5 putting the evidence in; is that right?

6 MR. KLEIN: Well, the objection is—

7 THE COURT: Let me hear if there's any objection on  
8 the evidentiary front. As I understand the motion, what you're  
9 really concerned about is an argument that would be made to the  
10 jury. You're not contesting that the evidence of partial  
11 repayment can be brought in.

12 MR. BURNETT: So we think it can come in as part of  
13 completing the story in the way we're envisioning it. I think  
14 depending on how the Court views partial repayment is whether  
15 or not it can support a good faith defense or not. For  
16 instance, if you were decide, like, they can argue good faith  
17 from this, which we think is legally absolutely wrong, we may  
18 not introduce the evidence, and then I don't think the defense  
19 can introduce it because the point of introducing it would be  
20 to make this good faith argument.

21 THE COURT: Well, that's one point. But not to take a  
22 tangent here, but if you're going to talk about victims as  
23 we've identified—and it seems like the government is going to  
24 talk about victims—why wouldn't it be relevant that, just in  
25 terms of the atmospherics, if you're going to use the term

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1 "victim" to talk about those individuals who Mr. Eisenberg  
2 allegedly intended to take money or property from, why wouldn't  
3 it bear on that, to say, well, there's a partial repayment so  
4 they were not victims in the sense that the jury might take  
5 that term to mean?

6 MR. BURNETT: Well, that would be legally wrong.  
7 Under the Second Circuit law, a victim is someone whose  
8 property was taken under the wire fraud statute, or intended to  
9 be taken. Whether or not they later got that property back is  
10 not legally relevant to their status as a victim. And it would  
11 be confusing for the jury to make an argument otherwise.

12 THE COURT: So your argument is that's the only thing  
13 that partial repayment could be relevant to, absent completing  
14 the story if you put the other parts of the negotiation into  
15 evidence.

16 MR. BURNETT: Right, to rebut this victim thing, it is  
17 precisely making a legal argument that the Second Circuit has  
18 not allowed.

19 THE COURT: Okay. So then turning back to Mr. Klein.  
20 Again, it's based on this question and whether you're going to  
21 bring up this argument that partial repayment under these  
22 circumstances bears on intent to defraud. So are you going to  
23 make that argument or not?

24 MR. KLEIN: Yes, your Honor.

25 THE COURT: Okay.

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1 MR. KLEIN: And your Honor, they plan to argue—and  
2 they put it in many briefs, many filings—that our client  
3 borrowed this money and had no intent to repay. And lo and  
4 behold, there was a repayment that was happening. And so  
5 they're going to argue that he had no intent to pay, that that  
6 was his intent, and then there is a repayment, and then they  
7 say that the intent of that repayment is something else, we  
8 need to be able to comment on that. It would be crazy. We  
9 need to be able to respond to that evidence, both that he had  
10 no intent ever to repay at the start, and then what they think  
11 his intent was by doing that. So we need to be able to respond  
12 to both of those things through argument, based on what the  
13 evidence shows, based on what comes in, based on the facts.

14 THE COURT: And give me what that argument would look  
15 like.

16 MR. KLEIN: I don't know exactly, your Honor, but it  
17 could be something like, well, the government's told you that  
18 he had no intent ever to repay, and then a few days later he  
19 started negotiating a way to get money back. It ended up  
20 turning into something like this—I don't want to forecast our  
21 whole defense, but I can see arguments coming out like that.  
22 Because they're going to put that in to show he's guilty, to  
23 show his intent at the time he allegedly committed these  
24 actions. They're going to use that evidence. We should be  
25 allowed to use it for the purposes I've put forth, both to show

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1 he didn't borrow with no intent to repay but also that what he  
2 intended by any of it is not something malicious or showing  
3 that his intent was criminal at the start.

4 THE COURT: So Mr. Burnett, just hypothetically, let's  
5 say that before the fact Mr. Eisenberg's intent was to expose  
6 vulnerabilities in Mango Markets and then execute on this but  
7 that his intent was always to repay and make the Mango Markets  
8 customers whole, and one way you know that that was a real  
9 intent that he had at that time is the fact that he actually  
10 did after the fact repay money that would help make the Mango  
11 Markets customers whole. Wouldn't it be relevant to the  
12 tentative fraud in the way that maybe *Vincent* foresaw under  
13 those circumstances?

14 MR. BURNETT: No, your Honor, because the intent to  
15 repay is the intent to repay the loan he took out, not intent  
16 to negotiate a separate settlement where he gets different  
17 terms. The repayment is just a fundamentally different thing  
18 that he's doing here than the repayment under the borrow. It's  
19 not like he just put the money back in Mango Markets' platform  
20 to repay the loan that he had taken out. He negotiated a  
21 separate agreement with Mango DAO, separate terms. It's more  
22 akin to like a separate out-of-court settlement, not like  
23 repaying a loan.

24 THE COURT: Well, you told me that the victims here  
25 included the customers and it wasn't just the platform or DAO,

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1 right?

2 MR. BURNETT: That's correct. But the reason the  
3 customers ultimately get paid whole is because Mango Markets  
4 itself chips in.

5 THE COURT: That's the reason. But just the repayment  
6 of those customers, this is only relevant to intent, and I'm  
7 just saying, even if it were through some other mechanism—I'll  
8 give an example. The borrowed funds come out, he takes them,  
9 and then he's like, oh, there was a mistake, you gave me these  
10 funds, you shouldn't have given them to me, so then he  
11 contacted DAO and says, okay, I'm going to give this to you  
12 directly, I'm not going to repay the loan because there would  
13 be some technical issues doing that, let me give it to you  
14 directly, give the customers their money back directly, their  
15 crypto directly, and that's just how we're going to do it.  
16 That doesn't make a difference. Or you can argue that it does.  
17 But it still bears on the issue of intent at the time of the  
18 offense.

19 MR. BURNETT: So I don't think—I think it might be a  
20 different situation where he was, like, returning 100 cents on  
21 the dollar to repay everyone. We're talking like 50 cents on  
22 the dollar.

23 THE COURT: Look, you can make this argument. Look,  
24 whether it is a strong argument or one that would be persuasive  
25 is another issue, and for all the reasons that you yourself are

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1 bringing in this story to show that there was intent going the  
2 other direction, Mr. Klein says, I understand that, I'm going  
3 to deal with that, but I want the freedom of movement to make  
4 my arguments related to intent. And there is case law support,  
5 some case law support to do that, pointing to the *Vincent* case.  
6 I understand that the Second Circuit in cases like *Sindona* has  
7 indicated that this evidence will many times have scant  
8 probative value, but here it is at least an articulated  
9 argument with some probative value, so I'm going to deny the  
10 motion on this ground. And obviously, again, we're going to  
11 police things during trial. So if there's an argument that  
12 goes out of bounds, you can obviously raise an objection to any  
13 of these issues. But I think I'm going to deny it at this  
14 time.

15 All right. So the last issue turns on self-serving  
16 exculpatory statements. So I think the idea here is that the  
17 government's going to bring in some statements by  
18 Mr. Eisenberg; there are other statements that, Mr. Klein, you  
19 would like to bring in, but you run into a hearsay problem. I  
20 think you didn't argue the hearsay issue in your briefing.  
21 Unless I missed something. What you said was that there's a  
22 rule of completeness issue and so what you really want is just  
23 some sort of designation of the statements that are being  
24 brought in and so you can properly designate any corresponding  
25 statements that would fit the rule of completeness; is that

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1 fair?

2 MR. KLEIN: Yes, your Honor. We're basically  
3 operating in a vacuum. So when we see what statements they  
4 want to put in in their exhibits, we'll look at them, we'll  
5 evaluate whether there are other statements that would be  
6 necessary to comply with the rule of completeness, or if  
7 there's a hearsay exception, we may have other statements. But  
8 we're really focused on the rule of completeness for the  
9 purposes of this, and so we just don't know what their  
10 statements they're going to offer in are, and we'll look at  
11 those, and they may have a thread of a text exchange or email  
12 exchange, and they may put in three sentences and we think a  
13 fourth one is necessary for context, and your Honor can rule on  
14 that.

15 THE COURT: Do you have a proposal on how we would do  
16 this? I'd like to accommodate this issue, and I'll hear from  
17 both sides. And I'd also like to avoid any kind of disruption  
18 during the trial where we have to have sidebars and take the  
19 jury out of the room to deal with these types of things. It  
20 seems like the kind of thing you can deal with in advance,  
21 possibly at the final pretrial conference. So if you have a  
22 suggestion, do you want to talk to the government and figure  
23 out a protocol here?

24 MR. KLEIN: I'll just tell you my suggestion right  
25 now, your Honor, and we can talk to them too for sure.

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1           Typically what I've seen is they'll give us the  
2 statements, they'll highlight what they're going to put in from  
3 the exhibit, like here's a thread, because sometimes you get an  
4 exhibit with just a giant thread and you don't know what part  
5 they're going to put in. They would highlight the statements  
6 they're going to put in, we'll look at it, and we'll let them  
7 know if we have a counterdesignation. Sort of like with the  
8 grand jury transcript case they referenced. We get their  
9 exhibits next week, I believe, the 25th. We're happy to start  
10 that process earlier if they have those things ready. We're  
11 happy to meet with them afterwards and discuss a process. But  
12 I agree with your Honor; we should be able to do this in  
13 advance of trial, and if there are disputes, you could rule on  
14 it before the jury would be brought out.

15           And we have something, your Honor—and if there is a  
16 statement that we see the need to put in to put in that  
17 context, we can inform them at that time. So there's a world  
18 in which they put in this statement that's on Twitter, for  
19 example, and our client, at the exact same moment, is writing  
20 another statement on some other social media platform or some  
21 other thing that adds necessary context to explain what he was  
22 saying, but we just don't know what they're doing yet.

23           THE COURT: Okay. So how do we move forward?

24           MR. BURNETT: Your Honor, if I may, we're producing  
25 our exhibits on the 25th. This is a case where there are a



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1 number of statements but it's, like, not really a huge  
2 statement case. I think it's going to be a pretty discrete  
3 number. I think either the—I think by the Monday of  
4 trial—that is, the day of jury selection—we should exchange  
5 counterdesignations they want to give. That should be plenty  
6 of time that we'll be able to address it the morning before the  
7 witness goes on who that evidence would be coming in through.  
8 I imagine we're going to be talking about a pretty limited set  
9 of stuff here.

10 THE COURT: And we can deal with that on the Monday,  
11 if that works, Mr. Klein, for your side?

12 MR. KLEIN: That works for us, your Honor.

13 THE COURT: So let's handle it that way.

14 So the motion itself will be denied without prejudice,  
15 with the understanding that we will have this procedure, and  
16 the main issue is going to be rule of completeness and context.  
17 Again, I'm not hearing how the statements would independently  
18 be admissible as offered by Mr. Eisenberg under the hearsay  
19 rules, and there's been no argument made. I think there was an  
20 argument made that they would not be admissible under 803(3),  
21 and I have not heard any reason why they would be.

22 MR. KLEIN: Your Honor, we haven't decided—we don't  
23 know what their statements are and what we'll need to offer,  
24 and when we see that, we may come forward and say, here's—

25 THE COURT: Okay. Without prejudice.

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1 MR. KLEIN: Yeah. Here's some statements we want to  
2 offer and here's our hearsay objection, and your Honor can rule  
3 on it.

4 THE COURT: Okay. All right. Anything else on  
5 motions *in limine* before we shift to the expert motions?

6 MR. BURNETT: No, your Honor.

7 MR. KLEIN: No, your Honor.

8 THE COURT: Okay. So now let's go to on the motions  
9 to exclude expert testimony.

10 So let's start with Mr. Sheridan. I'll just make a  
11 general comment that in terms of just the qualifications of  
12 these experts—so when I say these experts, I'm referring to  
13 Mr. Sheridan, Dr. Montgomery, and Mr. Jain—they're qualified  
14 as is required under Rule 702. I've reviewed their CVs, and  
15 they have the experience to opine in the subject matter areas  
16 that are outlined in the disclosures. However, I understand  
17 that there are particular parts of the disclosures that the  
18 parties are focusing on and there may be arguments that, as to  
19 those particular issues, they may fall outside the witness's  
20 expertise, but we'll handle that as we walk through the  
21 motions.

22 So let's start with Mr. Sheridan. And maybe on  
23 this—I don't know who's going to handle it. Mr. Davis? So  
24 let's start as to the issue of testimony as to intent. Which  
25 parts of Mr. Sheridan's disclosure are you focused on there?

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1 MR. DAVIS: So, your Honor, I think on this, there's  
2 two parts in particular. The one is as to the Mango Markets  
3 designers' intent when creating the protocol; and the second is  
4 as to Mr. Eisenberg's intent when making these trades. And I  
5 can point you to the places in their notice that directly speak  
6 to this.

7 So the first is as to point one, which is,  
8 Mr. Sheridan should not be able to give an opinion or leave the  
9 jurors with an impression about what the Mango Markets'  
10 designers intended.

11 THE COURT: Agreed.

12 MR. DAVIS: And so on page 2 of his disclosure—

13 THE COURT: And I'm looking at document 80-2.  
14 January 12, 2024, disclosure; is that the right one?

15 MR. DAVIS: Yes, your Honor. I'll call that one  
16 January 12th disclosure. So starting with  
17 paragraph 2—specifically, this is in bullet two, starting with  
18 the word "specifically," he will explain that the protocols are  
19 designed to, in some instances, enable conduct, in others to  
20 prevent it.

21 The next sentence is, "Though technically feasible, at  
22 the time of the trades at issue, Mango Markets had no terms of  
23 service beyond its code. It only gave a warning to users.

24 And then if we go down further to the last paragraph,  
25 Mr. Sheridan is expected to opine that the trades allegedly

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1 executed by Mr. Eisenberg were not prohibited by the Mango  
2 Markets protocol, including the Mango DAO as well as the  
3 Solana. So I think what the jury is left with with this  
4 opinion—and the wording of the disclosure is obviously  
5 important, but that's not what we're getting at here. What  
6 we're getting at here is what is the opinion he's going to say  
7 on the stand and what is the jury going to be left with, which  
8 is that Mr. Sheridan's going to be opining about what the  
9 intent was of those protocols, as I understand it, that the  
10 intent was to allow certain conduct or prohibit certain  
11 conduct; and going one step further, to allow the trades at  
12 issue or forbidding the trades at issue, and that is something  
13 that is improper for three independent reasons. So the first  
14 is—

15 THE COURT: I got you. It's not coming in. But I  
16 understand that Mr. Eisenberg is not going to make that  
17 argument.

18 So who's going to cover that on the defense side?  
19 Mr. Greenspan; is that right?

20 MR. GREENSPAN: Yes, your Honor.

21 THE COURT: Okay. All right. So you're not going to  
22 make that argument, right?

23 MR. GREENSPAN: No, we're not, and I think we were  
24 pretty clear on that in our papers.

25 THE COURT: As I understand it, it's almost like a

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1 wordsmithing thing with the disclosure. Like, you don't need  
2 to say that it was designed to do something because the way  
3 that you put it in your brief is, the testimony just goes to  
4 how Mango Markets' code worked in practice. No issue with  
5 that, right?

6 MR. DAVIS: No, your Honor. And I think this is  
7 exactly the point, which is, I understand and totally take  
8 counsel at their word they're not going to make this argument,  
9 but where the problem comes in is if they get their witness on  
10 the stand who is now expert to talk about why the protocol was  
11 in place, to talk about the intent of Mango Markets and leave  
12 the jury with that impression. So it's really important. The  
13 wordsmithing in the notice flows through to what he is actually  
14 permitted to testify about.

15 THE COURT: As I understand the disclosure, aside from  
16 the wordsmithing issue that obviously the disclosure says  
17 "design," and that could be understood in a couple different  
18 ways, as I understand—and Mr. Greenspan, you can correct me if  
19 I'm wrong—the only testimony is going to be, here's how it  
20 worked, okay? And that's it. It worked this way.

21 The why, I agree with you. I don't know that  
22 Mr. Sheridan has any expertise in the why of why any of these  
23 things were put in place. That's a question that can be asked  
24 to a Mango Markets witness if they're put on the stand, but I  
25 don't see anything in the disclosure that says that they're

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1 going to inquire and that Mr. Sheridan's going to testify as to  
2 the why. He's going to say, this is how the code worked in  
3 practice; in practice, this either allowed or did not allow X,  
4 Y, or Z, which he can testify about given his experience in  
5 cryptocurrency and blockchain and all the other credentials  
6 that he has. But outside of that, I don't think he's going to  
7 testify about anything along the lines of what you're talking  
8 about concerning intent. If that's—

9 MR. DAVIS: That's generally fine, with one caveat, on  
10 allow and prohibit. That's kind of a separate basis. But I  
11 agree with you. I think the—I'm not trying to speak past the  
12 Court in any way. The way this sentence is written is that  
13 he's going to explain that the protocols are designed to do  
14 something. That's what the notice says. And that speaks to  
15 the intent behind the protocols. And as long as that's off the  
16 table and instead it comes in the way the Court is suggesting,  
17 which is, here's how this works, let me explain to you the  
18 complicated—

19 THE COURT: That's a wordsmithing thing, as I get it.  
20 But I'll ask Mr. Greenspan: Any issue with that? Because I  
21 think that that is the source of the government's objection,  
22 but it seems like a wordsmithing thing.

23 MR. GREENSPAN: Yeah, no objection to that, and we  
24 noted in our papers, they also used the words "designed to do  
25 something" in exactly the same way with Mr. Jain's disclosure,

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1 and so long as Mr. Jain doesn't testify about the Mango  
2 Markets' intent, it will be irrelevant in the battle of  
3 experts.

4 THE COURT: That's fair. If Mr. Jain was to testify  
5 that Mango Markets was designed to do something, that would be  
6 subject to that same concern, fair?

7 MR. DAVIS: Agreed. In that he does not know—

8 THE COURT: No one's going to talk about the system  
9 being designed to do something, which is unnecessary anyway if  
10 what we're talking about is just how it worked.

11 MR. DAVIS: One factual clarification. What my friend  
12 in opposition just mentioned was a part of a notice where  
13 Mr. Jain is going to talk about how USDC was designed, and  
14 that's just the features of USDC, which is completely proper.

15 THE COURT: Why don't you just say what the features  
16 of USDC are.

17 MR. DAVIS: Totally agree.

18 THE COURT: And part of the issue here—let me take a  
19 step back—is that we have these disclosures, and look, you  
20 know, I came at this from the civil side, where we had Rule 26  
21 reports, where everything is contained in the report, and you  
22 know exactly what the expert is going to say and how they're  
23 going to say it. And so I can just strike things, I can let  
24 certain things in; there's no speculation about it. Here, we  
25 have the disclosures, and on both sides, they're vague in

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1 various respects, and so we're trying to think about what the  
2 testimony might look like coming in, which makes this  
3 enterprise a little difficult. So I'm going to give you some  
4 guideposts, and I will expect the parties to follow them.

5 The first guidepost is that no one's going to say that  
6 the system was designed to do something because of the  
7 government's, their concern that it goes to issues of third  
8 parties' intent. And so we can resolve that. I don't think  
9 there's any dispute about doing that. Agreed?

10 MR. DAVIS: That's what the government's request was  
11 and so we totally appreciate that.

12 And point taken off this. I think we are trying to  
13 work within the framework here, different from the civil  
14 context, where you have an expert deposition before the  
15 *Dauberts* and you're doing it, but we have these notices.  
16 That's the point of the detailed notice that we have.

17 And so if I may, I'm going to go on to the second  
18 point which the Court raised, which was, what's the second part  
19 of the intent-based opinion?

20 THE COURT: Yes. This is the analog of the "code is  
21 law" argument, because it says prohibited.

22 MR. DAVIS: So there's the prohibitive point, but then  
23 I think—I believe the Court first asked what are the other  
24 intent arguments that we're concerned about, and that's on  
25 page 30, where they have noticed that Mr. Sheridan is going to



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1 say that the trades were strictly the utilization of market  
2 mechanics without code violations, and simply by saying that  
3 and framing these trades and the hypothesizing about  
4 Mr. Eisenberg's intent behind making the trades at issue, that  
5 is impermissible in the same way that talking about Mango  
6 Markets' intent is impermissible. Mr. Sheridan is not an  
7 expert on Mr. Eisenberg's intent and should not be able to  
8 opine on that.

9 THE COURT: Okay. And Mr. Greenspan, I understood  
10 that to just be a title of a heading and then underlying that,  
11 that was the proposed subject of Mr. Sheridan's testimony. Am  
12 I wrong about that? Is he going to say, let me talk to you  
13 about how Mr. Eisenberg strategically utilized market mechanics  
14 here without a code violation?

15 MR. GREENSPAN: No. That's exactly right, your Honor.

16 THE COURT: Okay. So he's not going to say that. And  
17 I agree with you it would be improper for Mr. Sheridan to  
18 testify concerning strategic utilization of market mechanics  
19 without code violation. He can testify concerning the market  
20 mechanics and whether or not what Mr. Eisenberg did was  
21 consistent with the code, and whether modifications to the code  
22 were undertaken or not. Those are things that Mr. Sheridan  
23 could testify to. But as to the intent issue that you're  
24 raising concerning strategic utilization, that's not going to  
25 be something that Mr. Sheridan is going to be permitted to

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1 testify about.

2 MR. DAVIS: Thank you, your Honor. And in the same  
3 way, the next sentence under that heading, that the alleged  
4 trades on Mango Markets utilized authorized functionalities,  
5 highlighting systemic vulnerabilities, that again speaks to the  
6 intent of the trades, and that should be prohibited for the  
7 same reason, that it's not in Mr. Sheridan's expertise and also  
8 is irrelevant.

9 THE COURT: Well, let's put the vulnerabilities issue  
10 to the side, because it raises a separate argument that the  
11 government is making. But are you pointing specifically to a  
12 phrase like utilize, authorize, functionalities?

13 MR. DAVIS: No, your Honor. I'm highlighting the next  
14 sentence, which is this Highlighting Systemic Vulnerabilities.  
15 Like, it speaks to the purpose of the trades, which, again, is  
16 in what's in Mr. Eisenberg's head.

17 THE COURT: I agree with that. Let's put a pin in  
18 that one for a second because it raises all sorts of other  
19 issues as well. So I hear you. We'll get to that particular  
20 issue. Here, I'm really concerned with, what are the other  
21 ways in which the verbiage in this disclosure is imprecise,  
22 because I really think that that's what it is for a lot of  
23 these issues. Like, does the government have an issue with the  
24 use of the words "prohibited" or "authorized," because I don't  
25 know how else you're going to really talk about this stuff

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1 without saying that.

2 MR. DAVIS: Certainly prohibited, and I say yes, this  
3 does come down to wording, but they're not small things. We're  
4 now talking about an expert standing up, you know,  
5 getting—testifying, being sworn in as an expert and speaking  
6 to the jury, and on the prohibited, this is kind of the data  
7 point on the "code is law" argument that my colleague mentioned  
8 earlier. We were saying that, look, we totally get defendants  
9 that were not making a "code is law" argument, but they  
10 shouldn't be able to back-door it through an expert who is  
11 going to be suggesting through their testimony that, hey, Mango  
12 Markets could have had terms of service and they didn't, and  
13 that's one of the proposed opinions in the notice, which  
14 is—that Mr. Sheridan is going to say he could have—Mango  
15 Markets could have written it in terms of service but they did  
16 not and that the problem that—this conduct was allowed on the  
17 protocol and not prohibited. And now what the jury is left  
18 with—

19 THE COURT: I was with you as to everything you said  
20 up to "prohibitive." I thought the government's position was,  
21 we understand that that kind of testimony would be relevant to  
22 potentially intent.

23 MR. DAVIS: Yes, your Honor, but not through an  
24 expert. The way it comes in is, it's going to come in through  
25 lay testimony. There's going to be not a dispute that the

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1 trades were technologically feasible. It's very different than  
2 having an expert get up on the stand and say, hey, this was not  
3 prohibited by the Mango Markets protocol, they could have  
4 prohibited it but they did not. So if the jury is going to be  
5 allowed to hear that testimony, it is doing two things.  
6 They're going to be in their minds thinking, we have this  
7 expert saying that everything was okay with those trades.  
8 That's very different from how this will come in through a lay  
9 witness. Second, they're going to be mapping on Mr. Sheridan's  
10 view of "prohibited" to this Court's instructions about what is  
11 prohibited and what the law, and that is improper. And that's  
12 why the gatekeeping function with expert testimony is different  
13 from when it comes in through a lay witness. The government  
14 tried to be careful about, in their motion *in limine*, to say,  
15 look, the type—the facts relating to this "code of law"  
16 argument, we understand, are going to be coming in through,  
17 like, lay witnesses.

18 THE COURT: But wait. So this goes back to a  
19 discussion we had earlier. The fact that these trades were  
20 permitted, or whatever word you want to use, by Mango Markets  
21 under its code, that can bear on the issue of intent, right?  
22 Because a jury could say, well, if this were authorized by the  
23 code and didn't involve, let's say, hacking, then I can make  
24 some inferences that at least it's within the zone of something  
25 that might not have been a willful violation of the law. I

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1 mean, that's an argument that they could make, right? Is there  
2 some case or authority that indicates that the only evidence  
3 that can go to intent is the kind of, here's what the defendant  
4 was actually thinking, but that's the only evidence that can go  
5 to intent? Is there a case like that?

6 MR. DAVIS: No, your Honor. And again, sorry for  
7 backtracking a touch. I do think that we are saying that,  
8 look, this evidence is going to come in about the trades being  
9 technologically feasible through lay witnesses. The point  
10 we're making with this particular motion is how it should come  
11 in. It should not come in through an expert saying what is  
12 prohibited or not on the protocol and that by doing that, he  
13 can't speak to the defendant's intent.

14 THE COURT: He's just giving a technological  
15 perspective on what was possible in the system. It's really  
16 just wordsmithing again. I think it's the use of the word  
17 "prohibited" that is really bothering me.

18 MR. DAVIS: Agreed. And if the Court is going to rule  
19 that Mr. Sheridan cannot speak to what is prohibited or  
20 allowed—and those words do concern the government—then that's  
21 fine.

22 THE COURT: You'd have to come up with a different  
23 word, because I don't know what other word you'd use.

24 But let me ask Mr. Greenspan, do you have a solution  
25 for us here? Because I think the real issue is simply the use

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1 of the word "prohibited." Now I don't know that you need to  
2 use that word.

3 MR. GREENSPAN: Sure, your Honor. My reading of the  
4 disclosures is, it's pretty clear that Mr. Eisenberg—that the  
5 trades executed were not prohibited by the Mango Markets  
6 protocol, as well as the Solana blockchain. I mean, I  
7 think—it's hard for me to envision how this could be clearer,  
8 that that word is being used in regards to the specific rules  
9 of the exchange and not about some kind of closed law argument.

10 THE COURT: You're not going to make any argument, or  
11 Mr. Sheridan is not going to testify in any way, shape, or  
12 form, that the prohibition under the terms of service or under  
13 the lack of terms of service or whatever, the systems and  
14 protocols that Mango Markets had in place, bear directly on  
15 what was prohibited by the law or not, right?

16 MR. GREENSPAN: That's right, your Honor, and I think  
17 just as important, you know, in talking about this, just as  
18 important as the word that we're saying—either "permitted" or  
19 "not permitted" or "prohibited"—is the context. I mean, he's  
20 immediately after that explaining, what are we talking about.  
21 And that is the rules of the exchange. So I mean, as long as  
22 it's cabined specifically to that, I can't envision the jury  
23 being confused about what we're talking about.

24 THE COURT: Okay. Well, it needs to be cabined in  
25 that way, and if it's not cabined in that way, I mean, you're

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1 going to get a curative instruction which you don't want  
2 because it's going to highlight precisely what the government  
3 is arguing, that there is a sharp distinction between what is  
4 prohibited by the Mango Markets system and what is prohibited  
5 by law, which is the Court's duty to inform the jury of, okay?

6 MR. GREENSPAN: Yes, your Honor.

7 THE COURT: So this argument made in support of the  
8 government's motion will be rejected.

9 Let me take a step back. The motions to exclude these  
10 experts' testimony in full are going to be denied as to the  
11 three witnesses that we're talking about. What we're really  
12 doing is trying to establish guideposts for these witnesses  
13 going forward, and I think that's everyone's understanding of  
14 what's happening here. Is that fair?

15 MR. DAVIS: That's fair, your Honor. May I ask one  
16 clarifying question about this last ruling.

17 THE COURT: Sure.

18 MR. DAVIS: I just want to be clear. Like, on  
19 cross-examination, will the government be permitted to clarify  
20 that Mr. Sheridan is not making a ruling about what laws apply?

21 THE COURT: Yes.

22 MR. DAVIS: Okay. Thank you, your Honor.

23 THE COURT: Okay. Where is the next place, Mr. Davis,  
24 that you want to take me?

25 MR. DAVIS: I think that was the first three

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1 arguments. I think the next is trying—trying to focus on  
2 Mr. Sheridan's purported victim-blaming opinions, in the  
3 government's view, which—

4 THE COURT: This goes back to the vulnerabilities  
5 point and some of the related testimony concerning the audit;  
6 there's other aspects to that.

7 MR. DAVIS: Yes, your Honor. And as to this, the  
8 government has raised in its briefing a number of foundational,  
9 relevance, and 702 issues as to why this shouldn't come in, but  
10 more fundamentally, I don't think it is disputed by the defense  
11 that victim blaming like this is not a defense to the crime.  
12 It is not relevant in that sense. It cannot go to a  
13 defendant's intent to suggest that the victim was negligent or  
14 should have stopped it in some way. And so the government  
15 moves to preclude these opinions for that reason.

16 THE COURT: Okay. What opinions are you talking  
17 about, just so we're clear about it?

18 MR. DAVIS: Yes, your Honor.

19 This is starting, your Honor, on page 4 of the  
20 disclosure. "Mango Markets could have implemented, through  
21 terms of service addressing actions that were allowed by the  
22 code but prohibited by the protocol policies."

23 Then, "The platform vulnerabilities acknowledgment"  
24 paragraph, and "Lack of risk management and governance  
25 framework" paragraph.



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1           And then separately, going back to page 3, where he  
2       says, "Losses are a natural consequence of Mango Markets having  
3       created a token with little utility, because there was  
4       therefore no other offsetting market or use for the token."  
5       And noting "oracle" weaknesses and failure of Mango Markets to  
6       manage those "oracle" weaknesses.

7           And so at the bottom of that paragraph on page 3,  
8       which ends, "The inability of Mango Markets to effectively  
9       manage these oracle pricing strategies and liquidity issues  
10      unveiled critical deficiencies in the platform's risk  
11      management and market stability framework."

12          THE COURT: Okay. So Mr. Greenspan, what is the  
13      relevance? Let me ask it this way. The way the code worked in  
14      practice, that's coming in. Mr. Sheridan can testify about  
15      that. What is the relevance of testimony concerning  
16      vulnerabilities and other consequences of Mango Markets'  
17      structure?

18          MR. GREENSPAN: First, coming back to, you know—one  
19      of the things they said was, in the terms of service analysis,  
20      they talked about the sentence, "Mango Markets could have  
21      implemented through terms of service addressing actions—"

22          THE COURT: That I think is fine.

23          MR. GREENSPAN: I think you had ruled on that already.

24          THE COURT: Yes. There, you're almost saying that it  
25      was feasible for them to do it, they just didn't do it, okay?

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1 That's a separate issue.

2 MR. GREENSPAN: That's right.

3 THE COURT: Then I think the last two references that  
4 Mr. Davis referred us to, which point to vulnerabilities in the  
5 system and that, for instance, the losses were a natural  
6 consequence of the way in which the system was structured, what  
7 is the relevance of that kind of testimony?

8 MR. GREENSPAN: Your Honor, I think that this  
9 is—especially when we're talking about what's on page 4, I  
10 mean, we're talking about information that was known publicly,  
11 so this is information that either was known or could have been  
12 known to Mr. Eisenberg through the Mango DAO and through  
13 everyone else, and so—

14 THE COURT: Well, I think we're on page 3.

15 MR. GREENSPAN: Okay. I'm sorry. They highlighted  
16 both a section on page 4 and a section on—

17 THE COURT: Let me give you an example. Because  
18 again, I think we're going to have to do this through some  
19 guideposts, and so I'll give you, "The inability of Mango  
20 Markets to effectively manage these oracle pricing strategies  
21 and liquidity issues unveiled critical deficiencies in the  
22 platform's risk management and market stability framework."  
23 What is the relevance of that proposed testimony?

24 MR. GREENSPAN: Your Honor, I think that Mr. Sheridan  
25 here is really just talking about the mechanics of what

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1 happened and how it happened, and it provides the jury with an  
2 explanation of why, you know, the trading led to the results  
3 that it did. This, to me, is just a purely factual explanation  
4 of, you know, what the causal factors were for the way that the  
5 trading resulted.

6 THE COURT: Okay. But you would agree that testimony  
7 that the system was vulnerable or that it was unable to  
8 effectively manage certain strategies, that that type of  
9 testimony would not be relevant. As I understand it, what  
10 you're really saying is, we just want to say how things  
11 happened in relation to the system, and we want to be able to  
12 talk about that. But you don't need to talk about  
13 vulnerabilities or the inability of Mango Markets to do things,  
14 because I think the government's concern there is that it would  
15 be impermissible victim blaming. So absent some separate  
16 grounds for relevance, it should not be part of Mr. Sheridan's  
17 testimony. Again, I think this is really a wordsmithing thing,  
18 but let's resolve the wordsmithing issue.

19 MR. GREENSPAN: Yeah. Your Honor, I think that's  
20 exactly right. I think it is a wordsmithing issue, and I agree  
21 with you that the word "vulnerability" and "inability to  
22 manage," I think both of those are not essential to the point  
23 that we would like to deliver here, and I think, you know, we  
24 will not elicit that sort of testimony.

25 THE COURT: Okay. Mr. Davis, help me out here in how

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1 we resolve this, because it seems like with every issue,  
2 there's not really a dispute at this time, but I understand the  
3 government's concern that when Mr. Sheridan is on the stand,  
4 there are issues that are going to come up that key into these  
5 issues. So what's the best way to resolve these in a way that  
6 will provide proper guidance to the parties?

7 MR. DAVIS: Yes, your Honor. And I have to say, two  
8 initial reactions. I think the Court understood that we asked  
9 for the purported relevance for this testimony, and I have not  
10 heard one. And so for that reason, I think the best thing to  
11 do is, we have identified these places in this opinion where  
12 Mr. Sheridan purports to give his opinion about Mango Markets'  
13 "inability to manage critical deficiencies." I think from  
14 "strategic utilization" gets—that entire bullet gets crossed  
15 out. This "platform vulnerability's acknowledgment," that  
16 entire bullet and sub-bullet gets crossed out. "The lack of  
17 risk management and governance framework," that bullet gets  
18 crossed out. And I just have to say, like, I don't think this  
19 is like a small wording thing. I agree with you, you know, as  
20 to the points certain words are—you know, we can wordsmith  
21 around an issue. If Mr. Sheridan is going to go up there and  
22 say, Mango Markets had all these problems and basically had it  
23 coming, and here's how. They had critical problems, they were  
24 alerted—without foundation, they were alerted of a potential  
25 attack. There's no relevance to any of that. Mr. Sheridan's

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1 opinion doesn't have any of and should generally be precluded.

2 THE COURT: Why wouldn't it be relevant to a scheme to  
3 defraud?

4 MR. DAVIS: Because that's exactly what the cases say  
5 it is not relevant to in the victim-blaming context. In the  
6 string of cases in the Eastern District of New York, victim  
7 blaming, even highlighting that the victim was negligent, or  
8 could have stopped it, that does not negate intent. So that is  
9 the exact opposite of what that string of cases said. I don't  
10 hear any dispute said. And so for that reason, I think that  
11 portion of the notice and any opinion about Mango Markets'  
12 inability to manage critical deficiencies, lacking trade  
13 restrictions, lacking governances, all of this, Mr. Sheridan's  
14 opinion about all of that is irrelevant.

15 THE COURT: Okay. So just so I have it, it's the  
16 bullet that starts, "Strategic utilization of market mechanics  
17 without code violation"?

18 MR. DAVIS: Yes, your Honor, that's one. Then there's  
19 platform vulnerabilities acknowledgment. And then lack of risk  
20 management, the last bullet in the notes.

21 THE COURT: Okay. And Mr. Greenspan, I'll give you an  
22 opportunity to address the relevance particular to this "blame  
23 the victim" or vulnerability issue, just so I understand what  
24 your position is; or, if you tell me that you're not going to  
25 elicit testimony on these three bullets, then we don't have an

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1 issue here.

2 MR. GREENSPAN: So it's very—I think we discussed  
3 page 3, but they brought page 3 back up again. I mean, the  
4 first bullet under Strategic Utilization talks about no  
5 manipulation of the code. I think you've already ruled that  
6 that's—I believe your Honor has ruled that that's relevant.  
7 But they brought it up again. So I don't think that there's  
8 any reason to talk about that more. I think they're really  
9 talking about the next few bullets.

10 The next one—

11 THE COURT: Well, let's not talk about the specific  
12 language because I think I'm going to have to take this back  
13 and issue a ruling just so everyone has clear guidance.

14 MR. GREENSPAN: Fair enough.

15 THE COURT: Their point is, there are some parts of  
16 this that talk about how the system was vulnerable to an  
17 attack, and they say that that is just not relevant to anything  
18 that is going to come up at this trial. You can talk about how  
19 the code worked in practice, you can talk about what was  
20 feasible or not under the code and the other aspects of the  
21 system, but when you start talking about the fact that the  
22 system was vulnerable to losses and vulnerable to an attack,  
23 that goes to something that is inadmissible under the case law.  
24 Do you agree with that and you're just not going to make that  
25 argument, or do you have an argument for why that would be

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1 relevant?

2 MR. GREENSPAN: Understood, your Honor. We do not  
3 plan to blame the victims. That's not the purpose of this.

4 But turning to page 4 and the Platform Vulnerabilities  
5 Acknowledgment, this is information that was available to the  
6 public. And it was available to Mr. Eisenberg. And so a lot  
7 of these things, including, you know, the information about an  
8 audit that was conducted in May of 2022, the Litepaper,  
9 information about, you know, the fact that Mango Markets was—I  
10 guess this is actually on page 5, but—that they were warned  
11 about the specific possibility of a trade almost exactly—a  
12 trading strategy almost exactly like the one—

13 THE COURT: Why is that relevant?

14 MR. GREENSPAN: Because it goes to—this is  
15 information that was available both to the defendant, to Mango  
16 Markets, and to everyone else, and the question here is the  
17 materiality of the misrepresentations as well as the intent,  
18 and the fact that—

19 THE COURT: What misrepresentations are we talking  
20 about again? Maybe this is a better question for the  
21 government. I've heard a few references to misrepresentations  
22 and materiality of those misrepresentations, but I don't see  
23 anything in the papers that explains what those alleged  
24 misrepresentations are.

25 MR. DAVIS: Your Honor, this is the defendant

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1 proffering this evidence and trying to seek an expert on this  
2 grounds and saying it's material to some misrepresentation, so  
3 the burden is on them to show that. I was going to say, our  
4 understanding is it's not relevant to materiality or intent.  
5 We don't understand, truthfully, the materiality argument.  
6 We'd be open to hearing what it is. But what we've seen here  
7 is now this idea that, in response to, here's the relevance,  
8 the answer I heard was, this is publicly available and may have  
9 been known by the public and by Mr. Eisenberg. But that's not  
10 what they're seeking to admit. They're not seeking to admit  
11 the underlying facts about their public availability. They're  
12 seeking to admit Mr. Sheridan's expert opinion about those and  
13 what's relevant as to Mr. Sheridan's expert opinion about those  
14 is to suggest to the jury that Mango Markets was at fault here  
15 or Mango Markets had it coming, or that somehow the attack was  
16 due to Mango Markets' lack of, I guess it's risk management and  
17 governance frameworks, and that, your Honor, is irrelevant.

18 THE COURT: All right. Mr. Greenspan, do you have  
19 something else for me?

20 MR. GREENSPAN: Sure.

21 THE COURT: Using that last example, when you're  
22 saying the argument that Mango Markets was vulnerable to an  
23 attack, which is the kind of thread through a lot of this, what  
24 is that relevant to; the fact that they were vulnerable to an  
25 attack, what could that possibly be relevant to?



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1 MR. GREENSPAN: Right. Let me just—I want to clarify  
2 one thing.

3 THE COURT: Well, answer that question while it's in  
4 my head, and then you can make your other point.

5 MR. GREENSPAN: Yes, your Honor. So the, you  
6 know—there's this, you know—the misrepresentations involve  
7 location, identity, intent to borrow, I mean, all of these  
8 things, you know, at least if we talk about the March 2022  
9 notification, are put out there, and, you know, the Mango  
10 Markets DAO is aware that all of that is possible, and they  
11 choose not to do anything about it.

12 THE COURT: Well, their awareness of anything, how is  
13 that relevant to the charges that are in the indictment?

14 MR. GREENSPAN: The question is whether—

15 THE COURT: Is there an element of reliance, like  
16 reasonable reliance in a civil context?

17 MR. GREENSPAN: No, your Honor, but there has to be  
18 some materiality to those misrepresentations, both to the wire  
19 fraud and, at least arguably for Count One, the commodities  
20 fraud.

21 One other point that I want to make is that Mango  
22 Markets itself is—at least to this point, has not been  
23 identified as a victim. The Mango DAO has been identified as a  
24 victim and the customers have been identified as a victim. So  
25 to extent that there's some concern about a "blame the victim"

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1 here, nobody has, you know—there's no blame here to the  
2 customers, and this is about Mango Markets, not the DAO.

3 THE COURT: Okay. I understand the parties'  
4 arguments, and I have the identified sections from the  
5 government that they are challenging, and we will issue a  
6 ruling on the "blame the victim" issue that the government has  
7 asserted.

8 Mr. Davis, what's next in Mr. Sheridan's opinion, or  
9 we can move to Dr. Montgomery?

10 MR. DAVIS: I think that's it, your Honor. I  
11 think—obviously, we submitted a rebuttal expert notice for  
12 Mr. Jain responding to certain opinions that Mr. Sheridan put  
13 forth. Many of those we sought to exclude today. Looking  
14 through them, I think many of them may be addressed by the  
15 Court's forthcoming ruling on this pending victim-blaming  
16 motion, but, you know, I'm happy to address that supplemental  
17 response now if the Court wants, or we can wait till after  
18 Dr. Montgomery's—

19 THE COURT: Well, I think the Jain rebuttal is a  
20 rebuttal to Dr. Montgomery's opinion, correct, in large part,  
21 because it focuses on the issue of manipulation?

22 MR. DAVIS: Yes. So there's some of that too, and  
23 then there is also to Mr. Sheridan or a weakness opinion as  
24 well, so it's kind of a mixed rebuttal, but I defer to the  
25 Court on how you want to address—

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1 THE COURT: Yes, it's interrelated because part of the  
2 Oracle issue also touches on the possibility of manipulation  
3 and the fact that the Oracle strategy was designed to prevent  
4 manipulation, so I think it's related. So let's talk about  
5 Dr. Montgomery.

6 So first, on this comparison between conventional  
7 swaps and the perpetuals that are at issue in this case, I  
8 agree with you that Dr. Montgomery cannot offer some other  
9 definition of "swap" because "swap" is defined in the CEA. So  
10 that's very clear. And Mr. Greenspan, I don't understand that  
11 Dr. Montgomery will be trying to redefine "swap" or opine on  
12 even whether the perpetuals fall into the statutory definition  
13 of "swap"; is that correct?

14 MR. GREENSPAN: That's exactly right, your Honor.

15 THE COURT: So why is there a disclosure that talks  
16 about a comparison between the perpetuals and conventional  
17 swaps?

18 MR. GREENSPAN: Your Honor, this is directly in  
19 response to the disclosure of Jain, or Jain is essentially  
20 going to do exactly the same thing in comparing perpetual  
21 futures and talking about them and how they are similar to—I  
22 think he said products in traditional markets. I'd have to  
23 pull up the exact language. But essentially we view this as  
24 Jain is going to say why the perpetuals—

25 THE COURT: Are similar.

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1 MR. GREENSPAN: —are similar, and therefore, they're  
2 going to argue are swaps, and we're going to say the opposite  
3 through our expert.

4 THE COURT: Mr. Davis?

5 MS. HUANG: It's actually me, your Honor, for this  
6 one.

7 THE COURT: Okay. Great. Sorry about that.

8 MS. HUANG: No worries.

9 I actually think that's an incorrect reading of the  
10 disclosure, your Honor. If you take a look, it's ECF No. 87,  
11 page 4, with Mr. Jain. In paragraph 3, he does, as  
12 Mr. Greenspan notes, talk about how he is going to explain  
13 about how, for example, various concepts and economics of  
14 derivative contracts, futures contracts, spots exchanges, and  
15 swaps and commodities in foreign exchange markets, and he'll  
16 explain that similar products and concepts are often available  
17 in the cryptocurrency market, including Mango Markets.

18 What they have done in their opposition here is they  
19 tried to tie that to Mango's perpetuals as well. If you see  
20 actually in paragraph 5, where Mr. Jain makes it explicitly  
21 clear that what he is doing is just include an analysis of the  
22 characteristics, pricing, and economic features of a type of  
23 product available to users of Mango Markets called a perpetual  
24 futures contract. So the link is quite different here. It's  
25 subtle, kind of, but it's actually distinctive in that they're

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1 actually trying to make a comparison with what Dr. Montgomery  
2 calls a conventional swap with the perpetuals, whereas here,  
3 what Mr. Jain is doing is actually just presenting, for  
4 example, what's available out there in the commodities field  
5 and also then saying, here's what's available with Mango's  
6 perpetuals.

7 THE COURT: What's the relevance of that testimony  
8 from Mr. Jain?

9 MS. HUANG: The relevance here—

10 THE COURT: Doesn't that run into the same problem? I  
11 understand that Mr. Eisenberg hasn't moved to exclude the  
12 opening opinion from Mr. Jain, but he is contesting the  
13 exclusion of Dr. Montgomery's similar—it may not be exactly  
14 the same, but similar proposed testimony. So why don't we just  
15 get rid of both of them and we won't have an issue.

16 MS. HUANG: The Court's indulgence for a second.

17 (Government counsel conferring)

18 MS. HUANG: So, your Honor, I think the difference  
19 here is, first of all, in terms of relevance, right, as your  
20 Honor earlier noted, the jury is going to come in, this is  
21 going to be an entirely new world for them, with Mango Markets,  
22 with cryptocurrency, and so it's important for an expert to  
23 come in, to explain to them what a perpetual futures contract  
24 is and what the features are. That's what Mr. Jain is trying  
25 to do.

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1 THE COURT: If that's all he's going to do. But I  
2 don't think that's the concern. I think the concern is that  
3 he's going to say, well, there are these things in my line of  
4 business outside of the cryptocurrency space and I deal with  
5 swaps all the time, and guess what, like, they're also in the  
6 crypto space; for instance, these MNGO perpetuals. And as I  
7 understand Dr. Montgomery's proposed testimony, he's just  
8 saying, well, there are actually differences between MNGO  
9 perpetuals and conventional swaps like you just heard about  
10 from Mr. Jain. That's the issue.

11 MS. HUANG: I think it's going back to your Honor's  
12 earlier point about the wordsmithing. That's conventional,  
13 right? As your Honor noted earlier, you will be providing a  
14 definition of "swaps," and hearing that kind of terminology as  
15 conventional, this is what the standard, typical practice is,  
16 that's the problem I think we have with that framing.

17 THE COURT: And you're not going to be suggesting that  
18 the perpetuals here or anything like them are similar to swaps  
19 or other contracts that you might find in the noncrypto space,  
20 right? The kind of opposite of Dr. Montgomery's proposed  
21 testimony.

22 MS. HUANG: We're going to give your Honor kind of the  
23 context, right, in the typical market of what it is, to give  
24 the background so that the jurors are able to understand what a  
25 perpetual is, but it's not the same in terms of here's the

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1 typical standard, of what I see, and how this is similar or  
2 dissimilar from that. I think that's the difference here.

3 THE COURT: Okay. So I think the way it's going to  
4 work is, Mr. Jain is going to testify with the understanding  
5 that he's going to stay within those parameters, providing  
6 background, the background on the industry and these  
7 instruments, which is what I understand he is going to testify  
8 about. Then the government will be allowed to respond in kind.  
9 However, in the vein of giving appropriate guideposts here,  
10 neither side will be permitted to say that the perpetuals in  
11 this case fall into a definition of "swap" or refer to a  
12 definition of "swap" that is not contained in the statute at  
13 all. So they should not say, this is not a conventional swap;  
14 and I think that that principal is consistent with Judge  
15 Furman's decision in *Chastain*, which the parties have cited, in  
16 which he provides additional guidance on what the parties  
17 should do. But it appears that that's not really going to  
18 happen. It's really a reaction to not knowing what Mr. Jain is  
19 going to testify about. But what he's going to testify about  
20 is just, there are these types of instruments out there and  
21 there are various instruments that are also in the crypto  
22 space; and then Dr. Montgomery can fairly respond to that  
23 opinion. You're not taking the position that Dr. Montgomery is  
24 paralyzed from responding to that opinion.

25 MS. HUANG: Not at all, your Honor. It's just, again,

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1 the conventional part, I think that threw us off a little bit  
2 here.

3 THE COURT: Okay. And Mr. Greenspan, is there any  
4 reason why you need to refer to the other thing you're  
5 comparing the perpetuals to as conventional swaps? I think the  
6 problem there, as Judge Furman recognized in *Chastain*, is that  
7 it may suggest to the jury a different definition of "swap"  
8 than is in the Commodities Exchange Act.

9 MR. GREENSPAN: No, your Honor. If Mr. Jain refers to  
10 the commodities exchange market, then Mr. Montgomery can refer  
11 to them in the exact same way.

12 THE COURT: And not refer to conventional swaps.

13 MR. GREENSPAN: Yes, your Honor.

14 THE COURT: Okay.

15 MS. HUANG: Or traditional, your Honor.

16 THE COURT: Or traditional swaps. Neither  
17 conventional nor traditional swaps. We deal with the "swap"  
18 definition in the Commodities Exchange Act.

19 Okay. We've been going for like an hour and 45  
20 minutes. Does anyone need a break?

21 (Discussion off the record)

22 THE COURT: So the next issue, I think, concerns this  
23 issue of artificial price, which is a tough one.

24 So who's going to handle this from the government's  
25 side?



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1 MS. HUANG: I'm going to handle everything related to  
2 Dr. Montgomery, your Honor.

3 THE COURT: Okay. So what's the primary concern? And  
4 let's just get the disclosure out, and you can point me to the  
5 particular language that the government has a concern about.

6 MS. HUANG: Sure, your Honor. And as your Honor  
7 knows, there's three disclosures at this point relating—

8 THE COURT: Now we're looking at the latest one,  
9 right?

10 MS. HUANG: Yes, the latest one.

11 THE COURT: Which is February 26, 2024.

12 MS. HUANG: Exactly, your Honor. It's ECF 91-1. And  
13 we articulate this too in our *Daubert* motion as well, as well  
14 as our letter on this too. But the issue is that  
15 Dr. Montgomery, when it comes to artificial price, he is both  
16 defining it, which is encroaching on the Court's role here, and  
17 then there are other issues with that definition, including  
18 that, again, the Court should be defining "artificial price."  
19 We also believe—

20 THE COURT: What is the definition of "artificial  
21 price"?

22 MS. HUANG: Sure. Your Honor, so in *Amaranth*, the  
23 definition—it's, first of all, enumerated as an element, but  
24 in terms of the definition of "artificial," and I think there's  
25 some dispute with the parties too about what was done in

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1 Phillips. That was on the point of "artificial," not  
2 "artificial price." But I think they basically tried to  
3 dispute that that was actually even defined. But if your Honor  
4 actually took a look at the actual jury instructions there,  
5 further down, there are kind of the same language regarding  
6 intent that we've discussed in our papers.

7 THE COURT: So in Phillips—and this is consistent  
8 with cases like *Set Capital*—the term that is being defined is  
9 "manipulative act," and then the definition of that term has a  
10 bunch of different words that are used, almost like buzzwords.  
11 Like "artificially affect the price," "inject false trading  
12 signals, pricing signals," and then there's this issue of  
13 open-market conduct being potentially within that category if  
14 it is coupled with manipulative intent, right?

15 MS. HUANG: Exactly, your Honor.

16 THE COURT: Okay. But is there a case that I can look  
17 at that provides an authoritative definition—and the answer  
18 might be there is not one—of what it means to have an  
19 artificial price?

20 MS. HUANG: With the Court's indulgence, I can pull up  
21 something with a little bit more references.

22 THE COURT: And I'll allow the government, if you want  
23 to, you can put that in this paper form if it's going to take a  
24 second.

25 MS. HUANG: One second, your Honor.

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1 MR. GREENSPAN: Your Honor, we cited the definition in  
2 *In re Amaranth Natural Gas*, referring to the natural interplay  
3 of supply and demand.

4 THE COURT: That's also the definition given for  
5 "manipulative act." That's what I'm trying to understand. Let  
6 me put it this way. There is not absolute lucid clarity as to  
7 the definition of some of these terms. But I'm really asking  
8 this just so I understand what we're going to be dealing with  
9 when we get down to the question of putting together jury  
10 instructions. Obviously, in *Phillips*, there was no definition  
11 of "artificially affecting," which is the way that it was used  
12 in the instructions, but there were some references to it,  
13 wasn't there?

14 MR. BURNETT: So just because I've been at this for a  
15 while, unfortunately, so, I think they only did it that way in  
16 *Phillips* because there's only what is a Count One charge here,  
17 so we didn't actually need to show an artificial price, unlike,  
18 with respect to Count Two in this case, where we do need to  
19 show an artificial price, the Court didn't actually need to get  
20 to like articulating the definition of "artificial price" as  
21 opposed to "artificial price effect," or trying to inject an  
22 artificial price signal, which is the manipulation part of  
23 things. I think as a practical matter, from our perspective,  
24 they come pretty close to blending together, in the sense that  
25 our definition of "artificial price" is a price that is set not

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1 by natural—that is set by—sorry. The price is artificial if  
2 it is not set by the natural interplay of supply and demand but  
3 is rather rigged or controlled by the acts of the manipulator.  
4 And then as in *Phillips*, some ways the only way to distinguish  
5 between an artificial price and a nonartificial price is the  
6 scienter of the trader, and that is because artificial—whether  
7 a price is artificial or not depends on whether it's set by  
8 legitimate or illegitimate factors. A motivation simply to  
9 trade to control the price is not a legitimate factor.

10 THE COURT: Okay. That's helpful. So it's very close  
11 to the definition of "manipulative act."

12 MR. BURNETT: That's right. And I think my colleague  
13 is pulling some of this up. This—but I don't think there's  
14 been a jury instruction to my knowledge. Maybe there's been  
15 one or two in like the Northern District of Illinois on this  
16 point. But I think there's some case law in the Northern  
17 District of Illinois, I think it's like the *Kraft Food* cases,  
18 where they give like a more extensive explanation of this term.  
19 But basically the point is it's effectively the same as the  
20 open market manipulation standard from *Set Capital*, where  
21 the—if someone is rigging the price by intentionally engaging  
22 in open market trading to control the price, that is an  
23 artificial price.

24 THE COURT: Okay. So, Mr. Greenspan.

25 MR. GREENSPAN: Your Honor, I think their version of

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1 "artificial price" just swallowed the entire manipulation  
2 count.

3 THE COURT: Before you get to that, you at least agree  
4 on the natural interplay between supply and demand; you agree  
5 on that?

6 MR. GREENSPAN: We do, your Honor. We notice that  
7 that was the definition they gave in their opening brief. We  
8 adopted it and said we didn't have a dispute with them. We  
9 cited cases that we thought supported that. And that's the  
10 definition that's also in Mr. Montgomery's disclosure.

11 THE COURT: I just want to understand: Do you agree  
12 on that part of it, okay?

13 MR. GREENSPAN: Yes, your Honor.

14 THE COURT: Okay. So let's get back to the  
15 government. You don't have an issue with Dr. Montgomery  
16 opining that the trading conduct here was the reflection of the  
17 interplay between supply and demand, right? Because you agree  
18 that that's part of the definition, which goes to the  
19 underlying economics here, and so you're not complaining to the  
20 extent Dr. Montgomery, in this paragraph, tries to define  
21 "artificial price," just on that part?

22 MS. HUANG: I think, your Honor, the issue is that  
23 with that word "natural," right, because here what we are  
24 saying is that he did it with manipulative intent, that  
25 he—that this is artificial because of his intent here. That's

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1 I think the daylight between the two of us—

2 THE COURT: I understand that issue. But I'm saying,  
3 let's say for the moment that Dr. Montgomery did not refer to  
4 artificial price, he just didn't use that term, but opined,  
5 based on his economic expertise, on the nature of the  
6 instruments here, the lack of cash flows, and the fact that  
7 open-market trading activity would be the reflection of supply  
8 and demand in the market or based on his experience and his  
9 review, and stop there. Okay. Under those circumstances, you  
10 would not have an objection to Dr. Montgomery's opinion; is  
11 that fair?

12 MS. HUANG: As long as the "natural" part isn't in  
13 there, I think we would be—but it's just simply supply and  
14 demand, because he's—

15 THE COURT: So you're saying that, yeah, on  
16 cross-examination, you can confirm that there were other  
17 aspects of the inquiry that Dr. Montgomery did not address  
18 because he's not qualified to address them because he's coming  
19 in as an economics expert, right? So within the field of his  
20 expertise, as to the components of what would go into the  
21 artificial price inquiry, there's not an objection to  
22 Dr. Montgomery covering all those things, fair? If I put it  
23 that way? Meaning that he can talk about the lack of cash  
24 flows, he can say—he's just saying that that means that  
25 there's no fundamental value but that's just his

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1 characterization of when there's not a lot of cash flow and he  
2 says, based on that, the market trading activity would be a  
3 reflection of supply and demand, and that's the substantive  
4 part of Dr. Montgomery's opinion.

5 MS. HUANG: And I think, your Honor, just to be—

6 THE COURT: And there's no issue with that.

7 MS. HUANG: Yeah. I just wanted to clarify. This is  
8 simply describing; for example, there's no labeling of it being  
9 natural, no labeling of the artificial price.

10 THE COURT: There's no reference here to natural, so I  
11 don't think there's—

12 MS. HUANG: I think it's in their—in his disclosure  
13 documents, there were references to natural interplay of supply  
14 and demand.

15 THE COURT: Okay. And the concern there is that  
16 "natural interplay" would—the alternative is an artificial  
17 price?

18 MS. HUANG: Yes, your Honor. If you take a look at—

19 THE COURT: I've got the reference.

20 Okay. So then what we're talking right now is the  
21 second bullet.

22 MS. HUANG: Yes, your Honor.

23 THE COURT: Okay. So just if we were to strike the  
24 second—

25 MS. HUANG: The "natural" there; that is, "the natural

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1 interplay of supply and demand," and makes that the result of  
2 the interplay of supply and demand on the open market.

3 THE COURT: Okay. And then do you have an issue with,  
4 "On the open-market, absent wash trades is not artificial"?

5 MS. HUANG: Yeah, with the label "artificial," your  
6 Honor.

7 THE COURT: Right. So basically you're saying that if  
8 we just had the first sentence and then the second sentence  
9 in—I mean, this is like wordsmithing, but I really want to  
10 understand the dimensions the government's argument here. I'm  
11 not trying to wordsmith this disclosure. I'm trying to  
12 understand precisely what it is that's being objected to so I  
13 understand that "natural interplay of supply and demand" is an  
14 issue and the references to "artificial price," and the reason  
15 for both of those objections is that it would usurp the Court's  
16 role in instructing the jury as to what the definition of  
17 "artificial price" is, which includes, among other things,  
18 market activity that would, under either circumstances, be  
19 permitted but it's coupled with manipulative intent; is that  
20 fair?

21 MS. HUANG: That's fair, your Honor.

22 THE COURT: Okay. So Mr. Greenspan, help me out here.

23 MR. GREENSPAN: Sure, your Honor. I mean, I think  
24 we're—we've—you know—because we ended up having multiple  
25 rounds of briefing on this, you know, we sort of went round and



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1 round in circles, but the—basically the position we have  
2 is—and some of this is going to be addressed in the  
3 instructions—is that *Amaranth* makes clear and a number of  
4 other cases make clear that manipulation has four elements.  
5 One of them is artificiality and another is intent. Those are  
6 separate elements. And the government's definition is that  
7 artificiality subsumes intent; and in fact, it subsumes all  
8 four of the elements.

9 THE COURT: But why is Dr. Montgomery even qualified  
10 to testify as to artificiality, as it's understood under the  
11 case law definition of that element? He's an economics expert  
12 so let him talk about economics, meaning that all the  
13 underlying testimony that supports whatever conclusion you are  
14 going to ask the jury to reach on the elements of the offense,  
15 I'm not even hearing that there's an objection to any of that.  
16 It's really that when Dr. Montgomery is opining as to the  
17 ultimate standard, that's something that he does not have any  
18 expertise to offer an opinion on, it's potentially confusing to  
19 the jury, and it potentially usurps the Court's role in  
20 instructing the jury as to what the law is, and for those  
21 reasons, there's no reason to get there, and certainly on a  
22 402, 403 argument, I don't see how the risk of confusion would  
23 not substantially outweigh the probative value, given that all  
24 the underlying arguments are coming in; all the underlying  
25 economic testimony, what the instruments are, how they operate,

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1 that's all coming in.

2 MR. GREENSPAN: Fair enough, your Honor.

3 So the ultimate—just so I understand, the ultimate  
4 resolution here is we're going to strike the word "natural" and  
5 we're going to strike "is not artificial" from the second  
6 bullet point?

7 THE COURT: Right.

8 MS. HUANG: I think there were other references.

9 THE COURT: There's other references to "artificial  
10 price" and "cannot be artificial" and "was not artificial."  
11 Just a way of redoing that where he says, look, like, there  
12 were no cash flows so anything that happened with this  
13 particular instrument was going to either jack up the price or  
14 lower the price, and it's a thin market so it was going to have  
15 an impact on the price, and that's what I saw when I reviewed  
16 these instruments. And then you in argument obviously will  
17 take that testimony and then make permissible arguments based  
18 on, you know, how can we figure out the instructions here.

19 MR. GREENSPAN: Understood. We have no objection to  
20 that, your Honor. Thank you.

21 THE COURT: From the government's side, any issues,  
22 any remaining issues with that particular strand of the  
23 argument?

24 MS. HUANG: I think, your Honor, we put this  
25 underneath the hood of the artificial price aspect, but for

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1 example, we—and this is going back to actually *Daubert* motion,  
2 not the more recent materials, but we talked about, for  
3 example, how Dr. Montgomery's analysis, he doesn't actually  
4 account for the dramatic increase in the Mango Perps because of  
5 Dr. -- because of Mr. Eisenberg's trading. We cited a bevy of  
6 cases there to kind of show why that's problematic, and makes  
7 his opinion here unreliable.

8 And then also on the—on his kind of position  
9 regarding Mango being thin and illiquid, there's no work that's  
10 being shown by his part of how he has a basis to state that.  
11 It's just kind of simply said.

12 THE COURT: Well, isn't it fairly obvious that where  
13 there's a thin market with intermittent order flow, it is going  
14 to have potentially large swings based on trading that's of  
15 sizeable volume? I mean, I think that what he's saying is  
16 that—well, what he actually says is a thin market, as referred  
17 to by Dr. Mordecai, is—a market with de minimis and/or  
18 intermittent order flow. When a market is thin, it is  
19 vulnerable to large price swings, particularly when a sizeable  
20 transaction is made. And I take it that Dr. Montgomery will  
21 back that up with some economic understanding of when a market  
22 is thin, that means that there's not that much trading, so if  
23 there's going to be a big order that comes in, that will have a  
24 more dramatic impact on that particular instrument than it  
25 might if there is a huge market for, a very thick market for a

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1 particular item. Is that fair, Mr. Greenspan?

2 MR. GREENSPAN: Yes, it is. Thank you, your Honor.

3 THE COURT: Okay. So I understand the government's  
4 concern, but I think that that basis will be furnished, and if  
5 not, then you can certainly object during Dr. Montgomery's  
6 testimony.

7 MS. HUANG: Thank you.

8 THE COURT: And I think that those last two arguments  
9 you raised go to the weight of Dr. Montgomery's testimony and  
10 not the threshold admissibility.

11 Anything else with respect to Dr. Montgomery?

12 There were two additional issues that the Court  
13 identified. One was potential testimony concerning the intent  
14 of traders in financial markets to conceal their trading  
15 strategies, and as to that, as I understand the testimony,  
16 Dr. Montgomery is going to opine, based on his industry  
17 knowledge and his education, experience that, given the  
18 realities of the trading market and the fact that when a  
19 strategy is implemented, it may disclose then the ends of the  
20 trading strategy might be defeated. It is just industry  
21 practice to conceal certain types of strategies.

22 Mr. Greenspan, am I more or less on the right page there?

23 MR. GREENSPAN: That's exactly right, your Honor.

24 THE COURT: Okay. And maybe the government can  
25 explain what the nature of the objection is to Dr. Montgomery

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1 providing that kind of testimony. Is it based on his lack of  
2 trading experience or another concern?

3 MS. HUANG: Well, your Honor, first of all, I think we  
4 were obviously concerned about the language there, where he  
5 specifically talking about contingent strategies, we wanted to  
6 make sure that he is not actual opining on the intent and  
7 motives of these traders, given that there's a lot of case law  
8 stating that an expert cannot, you know, read minds and go into  
9 that.

10 But actually, related to the qualification point—and  
11 this is kind of, I think, as your Honor has seen, we've now had  
12 three disclosures and there's been kind of a moving target.  
13 And I think, you know, we can go into it too about how I  
14 believe that the positions here, the opinions, have actually  
15 evolved as we've raised issues, and that really kind of raises  
16 questions to us about exactly what Dr. Montgomery is going to  
17 testify on and what his basis is. And here, this is—they say  
18 here that Dr. Montgomery, while he's not a trader, he has  
19 extensive experience in "management of investment portfolios."  
20 However, if you actually look at what he has experience in,  
21 that's not what it says. In his CV, what it says is that he  
22 also has provided analysis on issues related to the management  
23 of investment portfolios, and investment companies. That's not  
24 the same as actually managing them.

25 THE COURT: You're not questioning Dr. Montgomery's

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1 experience and background in financial economics, securities,  
2 and valuation generally? I mean, isn't this fodder for  
3 cross-examination if Dr. Montgomery is testifying about things  
4 and they don't squarely fall within the metes and bounds of his  
5 professed experience? Because we have an expert with these  
6 types of credentials, and a point that would be fairly evident  
7 if you had any experience in financial economics, it seems like  
8 Dr. Montgomery's background, including work as an economist for  
9 the Federal Reserve Board, President's Council of Economic  
10 Advisors, and the International Monetary Fund would give him  
11 enough of a background to opine on some of these issues,  
12 general issues on what trade—what would be reasonable to  
13 expect in terms of people's trading strategies.

14 On your point about intent, I take that point, and  
15 again, consistent with the other points that we've made here,  
16 Mr. Greenspan, you will make sure that when Dr. Montgomery is  
17 testifying, he may testify as to industry practice concerning  
18 strategies, he should not veer into speaking about the intent  
19 of those other traders or anything of that kind; is that clear?

20 MR. GREENSPAN: Crystal clear. Thank you, your Honor.

21 THE COURT: Okay. Does that address the government's  
22 concern? You're going to be able to cross-examine  
23 Dr. Montgomery if you don't feel that his qualifications meet  
24 whatever testimony he offers on the stand. But I think for  
25 purposes of Rule 702, he meets the standard for sufficient

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1 qualifications.

2 MS. HUANG: Thank you, your Honor.

3 THE COURT: Okay. And last, there's one additional  
4 point, which is, testimony concerning that "many US  
5 dollar-denominated instruments considered part of the US money  
6 supply are issued by private entities, so issuance by a private  
7 entity and therefore not a unique characteristic of  
8 cryptocurrency which is offered as a response to testimony from  
9 Mr. Jain. Or at least that's what is suggested by  
10 Mr. Eisenberg. And that particular testimony is that USDC is  
11 different from the US dollar, including that it is issued by a  
12 private entity. And the defense says that if that statement  
13 and that testimony is not offered by Mr. Jain, then they would  
14 consider withdrawing the testimony identified by the  
15 government.

16 MS. HUANG: So, your Honor, I think this kind of goes  
17 back to what we were earlier talking about with Mr. Jain as  
18 well. This is again trying to explain to the jurors about what  
19 USDC is and what the features of it are. So it's comparing it  
20 to the US dollar there. What they're trying to do now, though,  
21 is trying to drag in US dollar-denominated instruments, which  
22 there's a whole breadth of what that actually encompasses, and  
23 also, of course, as we noted in our brief, especially with what  
24 they cited too and given Dr. Montgomery's experience at the  
25 Federal Reserve, that just makes it into a trial within a trial

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1 that would involve monetary policy, all of these confusing  
2 issues that have no actual relevance or bearing on this case.

3 THE COURT: Okay. And the argument that you're making  
4 is a 402, 403 argument?

5 MS. HUANG: Yes, your Honor.

6 THE COURT: Okay. Mr. Greenspan, what's the relevance  
7 of this testimony?

8 MR. GREENSPAN: Your Honor articulated it well, and I  
9 think it's a discrete point, and I actually don't think that it  
10 would get into any of those concerns that the government is  
11 talking about.

12 The government has said that USDC is different from  
13 the US dollar. It stressed that one of the differences, and I  
14 think the point that they're trying to make is that it goes to  
15 the medium of exchange argument that your Honor ruled was still  
16 alive on for trial. And Jain's—Mr. Jain's notice highlights  
17 the fact that it's privately issued, and Mr. Montgomery—or  
18 Dr. Montgomery is simply showing that the fact that it's  
19 privately issued is essentially meaningless.

20 THE COURT: Wait. Do that again for me, because you  
21 referenced a medium of exchange argument, and I just want to  
22 make sure I understand. You certainly have a position  
23 concerning medium of exchange, but that has not been addressed  
24 in any way in these briefs. And so is that the relevance of  
25 this testimony? As I understood it, as articulated in the



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1       briefs, the sole relevance of this testimony was as rebuttal  
2       for testimony that is going to be offered by Mr. Jain; is that  
3       fair?

4               MR. GREENSPAN: That's right. It's going to rebut  
5       Mr. — you know, we view this as—and, you know, again, it's  
6       like reading tea leaves here. Your Honor talked about—we're  
7       looking at pretty limited disclosures. But our understanding  
8       was that Mr. Jain was going to try to put daylight between USDC  
9       and the US dollar, in part to rebut the argument that  
10      Mr. Eisenberg has advanced about USDC serving as a medium of  
11      exchange and that going to the contract of sale.

12             THE COURT: Okay. So what's the relevance? Again,  
13      we're going to get into whether Mr. Jain should be talking  
14      about any of this stuff. So why is Mr. Jain offering his  
15      opinion and does he need to? If you withdraw that opinion,  
16      there's going to be no basis for Dr. Montgomery to respond to  
17      anything.

18             MS. HUANG: Your Honor, if they give up the opposition  
19      on the dollar point, then I think we're good.

20             THE COURT: Okay. Then it's out. Mr. Jain's not  
21      going to have that testimony.

22             MR. BURNETT: Wait, wait, wait. I want to make sure  
23      we're clear by "give up." So the reason it's in there is  
24      because there was extensive discussion during the motion to  
25      dismiss about the defense saying USDC is effectively the same

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1 thing as the dollar. If they're not going to make that  
2 argument at trial, then Mr. Jain doesn't need to testify to  
3 that point, but I'm not hearing that from the defense. So if  
4 that's the representation of the defense, fine, but otherwise—

5 THE COURT: I don't know that it is. But we had  
6 motions *in limine* here, and this is not one of the motions *in*  
7 *limine* that was raised, right? I assume that the parties would  
8 have—

9 MR. BURNETT: It wasn't raised because we assume  
10 they're making it and this is our position; this is our  
11 introducing evidence on that point.

12 THE COURT: Mr. Greenspan, the offer is on the table  
13 that if you're not presenting this medium of exchange argument  
14 at trial, then Mr. Jain will not testify on the differences  
15 between USDC from the dollar and then Dr. Montgomery need not  
16 testify as to the similarities.

17 MR. GREENSPAN: I'm sorry to say that's not an offer  
18 we can accept. I mean, that's been and continues to be an  
19 important part of our defense. And if Mr. Jain wants to opine  
20 on it and try to disprove our defense, I think we're entitled  
21 to have an expert rebut that.

22 THE COURT: Okay. That's fine.

23 So what we're going to do for purposes of this motion  
24 is Mr. Jain is going to be permitted to testify, and we will  
25 see what the bounds of Mr. Jain's testimony are and then that

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1 will define the contours of what Dr. Montgomery, in fairness,  
2 is able to do in response that would be fairly responsive to  
3 Mr. Jain's testimony. But I understand the daylight between  
4 the two statements as they are identified in the disclosures,  
5 but I agree with Mr. Greenspan that we're going to have to see  
6 how the testimony comes in and what the scope of it is to  
7 understand what Dr. Montgomery is either permitted or not  
8 permitted to do. So on that basis, the motion on those grounds  
9 will be denied.

10 Mr. Burnett, it seemed like you wanted to raise a  
11 deeper point here.

12 MR. BURNETT: Just one. So I think there's some kind  
13 of more fundamental issues with Mr. Montgomery's proposed  
14 testimony here, but just like as a practical trial mechanics  
15 thing I'm thinking through, like, whether—so waiting for  
16 Mr. Jain to testify and then deciding what Mr. Montgomery can  
17 do puts us in a little bit of an awkward spot, because if we  
18 want to embed responses to what Mr. Montgomery is going to say  
19 into Mr. Jain's testimony, we can't do that without knowing  
20 what Mr. Montgomery is going to potentially say, so I'm just  
21 wondering if maybe we could have like another round of kind of  
22 more specific briefing on this, like either during trial or in  
23 advance of Mr. Jain testifying, or we could get a little bit  
24 more guidance, you know, out early so we can decide kind of how  
25 far Mr. Jain will go on this, if there are things about

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1 Mr. Montgomery's testimony that he'll be allowed to say that  
2 Mr. Jain will want to address.

3 THE COURT: Let me ask Mr. Greenspan: If Mr. Jain  
4 does not testify as to this issue, then Dr. Montgomery is not  
5 going to testify as to the issue either, is that fair, or is he  
6 going to testify as to this regardless of what Mr. Jain does?

7 MR. GREENSPAN: No, that's absolutely right. This is  
8 strictly for rebuttal purposes.

9 THE COURT: Okay. So what's the issue? Why do we  
10 need further rounds of briefing?

11 MR. BURNETT: The reason we need further rounds of  
12 briefing is, depending on what Mr. Montgomery is allowed to say  
13 on rebuttal, there might be rebuttals to that rebuttal that we  
14 would build into Mr. Jain's testimony, but we can't predict  
15 that without knowing what he's going to be allowed to say.

16 THE COURT: Well, this is what we're going to do. So,  
17 I mean, you've had Dr. Montgomery's disclosure. I mean, I  
18 understand you've objected to it on 402 and 403 grounds, but  
19 you've had the disclosure. So then wouldn't it have been  
20 appropriate for the government to identify any supplemental,  
21 further rebuttal from Mr. Jain they would want to include? Why  
22 do we need further rounds of this is what I'm trying to  
23 understand.

24 MR. BURNETT: Well, I think the extent to which  
25 this—we delve into this topic is going to depend somewhat on—

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1 THE COURT: You have the disclosures as they stand, so  
2 you can see the disclosures. I understand your objection on  
3 402, 403 grounds. I'm saying that I'm not accepting that  
4 objection for purposes of the *Daubert*, at this stage. You can  
5 obviously make any objections you want during the trial. But  
6 you know what the defense is proposing that he will testify to.  
7 And so if there's some further statement, you could certainly  
8 submit a letter, make an application for a further supplement  
9 from Mr. Jain, and the defense can then come back and object to  
10 that disclosure if they want to. I think that's the proper  
11 course. I don't think any further rounds of anything is  
12 necessary.

13 MR. BURNETT: Thank you, your Honor. I'm just trying  
14 to game out the extent to which we need to get into, like, what  
15 is the US money supply as calculated by the Fed, which I think  
16 is kind of like a fundamental part of this and is very  
17 different than any of the issues the jury would have to deal  
18 with.

19 THE COURT: Sure. I imagine that there will be  
20 further applications in this case. So you can make a further  
21 application and then the defense can object if they need to.

22 Okay. Anything else on that?

23 MR. BURNETT: No, thank you.

24 THE COURT: Okay. Anything else concerning  
25 Dr. Montgomery?

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1 MS. HUANG: Nothing from the government, your Honor.  
2 Thank you.

3 THE COURT: Okay. So then the last item on the agenda  
4 is the motion to exclude the rebuttal testimony, the current  
5 rebuttal testimony of Mr. Jain. So I guess my question is—I  
6 don't know who's going to handle this on the government's side.

7 Mr. Davis? Okay.

8 So if Dr. Montgomery is not testifying as to  
9 artificial price, then how is it that Mr. Jain can testify as  
10 to the manipulation of price using those terms?

11 MR. DAVIS: So again, just to frame here, we moved to  
12 preclude a bunch of Mr. Sheridan's opinions that are the  
13 predicate for this rebuttal testimony, but if Mr. Sheridan is  
14 going to be permitted to put forward this idea that there's—a  
15 low liquidity was the reason for this attack and that it was a  
16 natural consequence that this attack was going to take  
17 place—and we've gone over the reasons why that could be  
18 precluded—then we need to be able to meet that with rebuttal  
19 testimony. So here, he's not talking about whether there was  
20 actual manipulation of the trades at issue or opining on the  
21 actual trades at issue here. Mr. Jain's response is basically,  
22 if he wants to say that, look, low liquidity leads to these  
23 natural losses, Mr. Jain is going to say that's not—there's a  
24 number of things that go into the ability to manipulate prices.

25 THE COURT: So if that testimony that you identified

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1 that the Court is going to issue a ruling on, providing  
2 guidance on those I believe three bullets—

3 MR. DAVIS: Yes.

4 THE COURT: If that were out, especially as to the  
5 particular statements that you identify, then what is left of  
6 what you would be proffering in terms of Mr. Jain's rebuttal  
7 testimony?

8 MR. DAVIS: I don't think he would have anything to  
9 rebut to at that point. If those—if Mr. Sheridan is not  
10 permitted to make these victim-blaming arguments that we've  
11 identified, including the low liquidity argument, and also the  
12 Oracle weaknesses argument that we've identified, I don't think  
13 we have anything to rebut to. I'm looking at my colleagues to  
14 see if that's wrong, but that's my understanding.

15 THE COURT: Okay. Then we'll deal with  
16 Mr. Eisenberg's motion to exclude rebuttal testimony from  
17 Mr. Jain at the same time that we deal with those three bullets  
18 that you have identified in Mr. Sheridan's argument.

19 MR. DAVIS: I think that's totally fine. We had three  
20 different rebuttal points. And just to clarify, the last one  
21 also is something we addressed because it is rebuttal, which  
22 is—

23 THE COURT: Okay. So just make sure I'm with you.

24 MR. DAVIS: Yeah.

25 THE COURT: What you just said in terms of being gone,

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1 those parts of the Sheridan report being out, that applies to  
2 rebuttal opinion 1A and rebuttal opinion 1B.

3 MR. DAVIS: Yes, your Honor. Which is like subsection  
4 A and B in our response letter.

5 THE COURT: Okay. And rebuttal opinion 2.

6 MR. DAVIS: Yes. So now this is—this goes to a point  
7 at which I think we also have clarity on now, so I'm trying to  
8 think in realtime how—

9 THE COURT: It's going to be out. So—

10 MR. DAVIS: Having heard that—I was reading the room.

11 THE COURT: Yeah.

12 MR. DAVIS: So it's out. Understood. But we've  
13 clarified that we will be able to cross this—

14 THE COURT: It's going to be out, so okay. But the  
15 Court will address the outstanding issues in Mr. Sheridan's  
16 report as well as rebuttal opinion 1A and 1B from Mr. Jain's  
17 report.

18 Okay. Mr. Davis or anyone on the government's side,  
19 anything else that we need to address in terms of the motions  
20 *in limine* and *Daubert* motions? And if you can, just a  
21 second—I know everybody's been here for a long time—anything  
22 else that we can productively do today?

23 MR. DAVIS: Nothing on the motions or *Daubert*. We  
24 have a couple logistical things, but happy to hear from the  
25 Court first.



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1 THE COURT: Mr. Greenspan or Mr. Klein, anything on  
2 your end for these motions?

3 MR. KLEIN: Nothing on motions. We have logistical  
4 things also.

5 THE COURT: Thank you.

6 Mr. Davis, I'll let you go first.

7 MR. DAVIS: We understand from the Court's individual  
8 rules the trial schedule is 9 to 2 that we're here, and we're  
9 just trying to game out our witnesses showing up on time and  
10 all that.

11 THE COURT: You know, that's what we have tried, but  
12 we may go to a conventional trial day, just the usual. What  
13 would the parties prefer? Would the parties prefer the Judge  
14 Furman protocol?

15 MR. DAVIS: Yes, your Honor. Yes, your Honor.

16 MR. KLEIN: Yes, your Honor.

17 THE COURT: Okay. We'll stick to it. We aim to  
18 please here.

19 MR. DAVIS: Thank you, your Honor.

20 THE COURT: We'll do that.

21 Any other issues?

22 MR. DAVIS: I'm sure there will be other issues, but  
23 not today, your Honor.

24 THE COURT: Of course.

25 Mr. Klein.

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1 MR. KLEIN: Your Honor, the jury instructions are  
2 currently due on the 20th, and, you know, we've got tied into  
3 obviously dealing with this hearing and preparing additional  
4 round of briefing. We'd like a—and your Honor asked us to be  
5 careful about asking for extensions, but we would like a brief  
6 extension on that. We have a hearing on the 26th at our  
7 pretrial conference, so we want to make sure the Court has them  
8 in advance, but the 20th is next Thursday, and we do want to  
9 spend time going through them with our client, and there's been  
10 some rulings here and things we want to process in terms of how  
11 we put them together. So could we have till the—

12 THE COURT: 24th?

13 MR. KLEIN: Yes, your Honor.

14 THE COURT: Yes, that's fine.

15 MR. DAVIS: No objection.

16 MR. KLEIN: And we'll split—and we can do the voir  
17 dire Thursday, the verdict form. Just the jury instructions.

18 THE COURT: That's acceptable to the Court.

19 All right. Anything else from your side?

20 MR. DAVIS: One moment, your Honor.

21 Nothing from the government, your Honor. Thank you.

22 THE COURT: All right. Anything else, Mr. Klein?

23 MR. KLEIN: Nothing, your Honor.

24 THE COURT: All right. I really appreciate everyone's  
25 attendance here and the good argument on both sides. Thank you

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1 very much, and we will have our rulings out on the remaining  
2 issues here.

3 ALL COUNSEL: Thank you, your Honor.

4 THE COURT: Thank you. We're adjourned.

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